(14) No. 99-579-CFX Title: Harris Trust and Savings Bank, etc., et al., Petitioners
v.
Salomon Smith Barney Inc., et al.

Docketed:
October 4, 1999 Court: United States Court of Appeals for the Seventh Circuit

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Oct 4 1999 | Petition for writ of certiorari filed. (Response due December 3, 1999) |
| | Oct 4 1999 | Appendix of petitioner filed. |
| | Oct 20 1999 | Order extending time to file response to petition until December 3, 1999. |
| | Dec 3 1999 | Brief of respondents Salomon Brothers Inc., et al. in opposition filed. |
| | Dec 6 1999 | Brief amici curiae of American Council of Life Insurance, et al. filed. |
| | Dec 14 1999 | Reply brief of petitioners Harris Trust & Savings Bank, et al. filed. |
| | Dec 15 1999 | DISTRIBUTED. January 7, 2000 |
| | Jan 7 2000 | Petition GRANTED. The brief of petitioners is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Tuesday, February 22, 2000. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Thursday, March 23, 2000. A reply brief, if any, is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Monday, April 10, 2000. Rule 29.2 does not apply.<br>SET FOR ARGUMENT April 17, 2000.<br>********** |
| | Jan 7 2000 | Motions to file briefs as amicus curiae and any motions relating to oral argument must be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 24, 2000. Rule 29.2 does not apply. |
| | Feb 22 2000 | Joint appendix filed. |
| | Feb 22 2000 | Brief of petitioners Harris Trust and Savings Bank amd Ameritech Corporation filed. |
| | Feb 22 2000 | Brief amici curiae of AARP, et al. filed. |
| | Feb 22 2000 | Brief amicus curiae of United States filed. |
| | Mar 1 2000 | Record filed. |
| | Mar 9 2000 | CIRCULATED. |
| | Mar 22 2000 | Brief amici curiae of Bond Market Association and Securities Industry Association filed. |
| | Mar 23 2000 | Brief amici curiae of American Council of Life Insurance, et al. filed. |
| | Mar 23 2000 | Brief of respondents Salomon Bros., Inc., et al. filed. |
| | Mar 24 2000 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed. |
| | Mar 30 2000 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument DISTRIBUTED. |

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No. 99-579-CFX

| Entry | Date | Proceedings and Orders |
|---|---|---|
| | Apr 3 2000 | Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED. |
| | Apr 7 2000 | Reply brief of petitioners Harris Trust and Savings Bank, et al. filed. |
| | Apr 17 2000 | ARGUED. |

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No. 99-

IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents.*

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## PETITION FOR WRIT OF CERTIORARI

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October 1999

2788

## QUESTION PRESENTED

Whether a non-fiduciary party in interest with respect to an employee benefit plan that engages in a prohibited transaction, as defined in Section 406(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a)(1), with the plan can be sued under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief," including restitution.

## PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The petitioners in this case are Harris Trust and Savings Bank, not individually but solely as Trustee for the Ameritech Pension Trust, and Ameritech Corporation. Petitioners were plaintiffs in the District Court and appellees in the Court of Appeals.

Salomon Brothers Inc and Salomon Brothers Realty Corp. were defendants in the District Court and appellants in the Court of Appeals.

There were no other parties in the Court of Appeals.

Petitioner Harris Trust and Savings Bank is wholly owned by Harris Bankcorp Inc., which is in turn wholly owned by Bankmont Financial Corp., which is in turn wholly owned by the Bank of Montreal, whose stock is publicly traded.

Petitioner Ameritech Corporation, whose stock is publicly traded, has no parent company, nor does any publicly held company own 10% or more of Ameritech's stock.



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IN THE

# Supreme Court of the United States

No. 99-

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

Petitioners Harris Trust and Savings Bank and Ameritech Corporation hereby petition this Court to grant a writ of certiorari to review the decision below of the United States Court of Appeals for the Seventh Circuit. The Seventh Circuit held that a non-fiduciary party in interest with respect to an employee benefit plan cannot be required under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1132(a)(3), to disgorge ill-gotten gains that it realizes by entering into a prohibited transaction, as defined in ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), with the plan. The decision places the Seventh Circuit squarely in conflict with all six of the other circuit courts that have addressed this key question regarding the law applicable to employee benefit plans. Certiorari should be granted to resolve the circuit split on this question, which

is critical to the proper protection of employee benefit plans and their participants and beneficiaries. Clarity and nationwide uniformity of law on this issue are extremely important.

## OPINIONS BELOW

The opinion of the Court of Appeals, App. 1a-13a, is reported at 184 F.3d 646. The memorandum decision of the District Court, App. 14a-55a, as modified, App. 56a, is not reported. The opinions of the District Court denying reconsideration, App. 57a-61a, and certifying the issue presented here for interlocutory appeal to the Court of Appeals, App. 62a-65a, are also unreported.

## JURISDICTION

The judgment of the Court of Appeals was entered on July 6, 1999. The opinion indicated that, because the holding created a circuit split, the opinion had been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e), and a majority of the judges had voted not to rehear the case en banc. App. 13a n.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Sections 3(14), 3(21), 406(a)(1), 408(a), 502(a)(3) and (5), and 502(i) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1002(14), 1002(21), 1106(a)(1), 1108(a), 1132(a)(3) and (5), and 1132(i), and Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975, are reproduced in relevant part at App. 66a-77a.



## STATEMENT OF THE CASE

### A. Parties in Interest and Prohibited Transactions

One of the fundamental purposes of the Employee Retirement Income Security Act of 1974 ("ERISA") is to protect employee benefit plan assets – and thereby the benefit security of plan participants and beneficiaries – by prohibiting certain transactions that carry a risk of self-dealing, unfairness or abuse. Rather than follow the common law, which required case-by-case determinations of whether transactions were at arm's-length and their terms were fair,[1] Congress adopted a strategy of broadly prohibiting a list of types of transactions between plans and "parties in interest," and then providing for exemptions – either by statute or by administrative action – where Congress or the pertinent agency concludes that an exemption is justified.

ERISA's basic definition of "prohibited transaction" is a "direct or indirect"

> "(A) sale or exchange, or leasing of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;

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[1] *See Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993) ("Before ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct. This provided an open door for abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid.").

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, or any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a)."

ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), App. 74a.

The statute's definition of a "party in interest" with respect to an employee benefit plan is broad, encompassing service providers, plan fiduciaries, plan employees, employers and unions with covered employees, and certain relatives, owners, employees, officers, directors, share-holders and partners of the foregoing. ERISA § 3(14), 29 U.S.C. § 1002(14), App. 70a-72a.

Statutory prohibited transaction exemptions are set forth in ERISA § 408, 29 U.S.C. § 1108. Section 408(a), App. 75a, empowers the Secretary of Labor to grant additional exemptions after consultation and coordination with the Secretary of the Treasury.

A closely parallel scheme was also established in Section 4975 of the Internal Revenue Code ("IRC"), 26 U.S.C. § 4975, App. 66a-70a, which was enacted as part of ERISA. Under Section 4975, "prohibited transactions" (defined similarly but not identically to the definition in ERISA) between plans and "disqualified persons" (the counterpart to the similarly, but not identically, defined "party in interest" in ERISA) are barred unless covered by an exemption. A two-tiered excise tax is payable by any disqualified person, other than a fiduciary acting solely as such, who participates in the transaction: an annual tax of



(at present) 15% of the amount involved in the transaction and, if the transaction is not corrected upon notice, a further tax of 100% of the amount involved.[2] Statutory exemptions are set forth in Section 4975(d), and the Secretary of the Treasury is empowered in Section 4975(c)(2) to grant additional exemptions after consultation and coordination with the Secretary of Labor. *See also* ERISA § 3003(b), 29 U.S.C. § 1203(b) (Secretaries shall harmonize rules under ERISA § 406(a)(1) with those under IRC § 4975).

These prohibited transaction provisions lie at the core of ERISA's mission of protecting employee benefit plan assets and beneficiaries. *See, e.g., Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993).

### B. ERISA § 502(a)(3)

Section 502 of ERISA addresses civil enforcement. Section 502(a), App. 76a, authorizes a variety of civil actions, including, in paragraph (3), the action brought here – a civil action by a fiduciary to obtain "appropriate equitable relief" to redress "any act or practice which violates" Title I

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[2] Section 502(i) of ERISA, 29 U.S.C. § 1132(i), gives the Secretary of Labor discretionary authority to impose a two-tiered civil penalty very similar to the IRC § 4975 excise taxes (except that the first tier is 5% of the amount involved in the transaction). Section 502(i) does not apply to a transaction "with respect to a plan described in section 4975(e)(1)" of the Internal Revenue Code, 29 U.S.C. § 4975(e)(1), whereas IRC § 4975 applies *only* to such plans. Section 4975 (e)(1) defines "plan," as relevant here, as a plan that, like the Ameritech plans, either is tax-qualified under the Internal Revenue Code or ever was determined by the Secretary of the Treasury to be tax-qualified. Whereas tax-qualified plans must be funded, non-qualified ERISA plans (such as welfare benefit plans) generally need not be.

(Sections 2-734) of ERISA. Paragraph (5) authorizes equivalent actions by the Secretary of Labor.

### C. The Facts[3]

Petitioner Ameritech Corporation is the plan sponsor and plan administrator of pension plans for employees and retirees of Ameritech and its affiliates and subsidiaries. At all relevant times, petitioner Harris Trust and Savings Bank was the Trustee for the Ameritech Pension Trust, through which plans with some 118,000 beneficiaries are funded. Ameritech, as plan administrator, and Harris Trust, as trustee, were plan fiduciaries as defined in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A), App. 73a.

Respondents Salomon Brothers Inc and Salomon Brothers Realty Corp. (collectively, "Salomon") were service providers to the plans. App. 2a. Salomon received hundreds of thousands of dollars per year in commissions and other compensation for securities brokerage and other services provided to the plans during the relevant years. Supplemental Appendix of Plaintiffs-Appellees in Court of Appeals (hereinafter, "C.A. Supp. App.") at 91-92, 419-56. As provider of these services, Salomon was a "party in interest" with respect to the plans within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14). The District Court found, however, that Salomon was not, by virtue of its

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[3] Some of the facts set forth herein are contested by Salomon. Because of the course that proceedings took below, the lower courts did not resolve such factual disputes. For purposes of resolving the question of law presented here, the facts as alleged by petitioners should be taken as proven. *Burlington Industries, Inc.* v. *Ellerth*, 118 S. Ct. 2257, 2262 (1998); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).



provision of these services or of investment advice to the plans, a fiduciary of the plans. App. 20a-30a.

In the 1987-89 period, Salomon acted as placement agent for three issuances of mortgage notes by Motels of America, Inc., and one issuance of mortgage notes by Best Inns, Inc. In connection with each of these transactions, Salomon entered into a "Fee Agreement" with the issuer, under which, as consideration for its services, Salomon became entitled to fees based on a percentage of any "net cash flow" generated by the motels involved, plus a percentage of any appreciation of the motel properties upon maturity of the associated notes or sale of the properties. App. 2a.

During 1987-89, Salomon sold a 100% interest in one of the Fee Agreements and 95% interests in the other three Fee Agreements to the Ameritech Pension Trust for close to $21 million. App. 18a-19a. The purchases were directed by National Investment Services of America ("NISA"), an investment manager to which Ameritech had delegated investment discretion over a portion of the Trust's assets. C.A. Supp. App. 105-16; App. 42a. By virtue of its discretion over investment of plan assets, NISA was a plan fiduciary. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

Petitioners allege that Salomon failed to make timely disclosure of information it had as to the extreme riskiness, poor performance and low value of the Fee Agreements. App. 19a. Petitioners further maintain that the Fee Agreement sales were prohibited transactions, and did not qualify for any of the statutory or regulatory exemptions from prohibited transaction status. App. 30a-31a, 44a.

The Fee Agreements proved to be nearly worthless. App. 19a. Both issuers went into bankruptcy, and, after taking all reasonable steps to mitigate its losses, the

Ameritech Pension Trust lost $19,889,602 of the $20,915,000 it paid for these investments. C.A. Supp. App. 170, 177, 180. Salomon, which had a basis of zero in the Fee Agreements, reaped a profit of $20,915,000 from selling them to the Trust. C.A. Supp. App.105, 127-29, 393-95.

### D. The Proceedings Below

Petitioners filed suit against Salomon in 1992, alleging claims under ERISA, RICO, and Illinois statutory and common law. The relevant claim for present purposes is Count II of the Second Amended Complaint, which asserts that, in selling the Fee Agreements to the Pension Trust, Salomon, a party in interest with respect to the plans, participated in a prohibited transaction under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), and is liable to provide restitution to the Trust under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

Salomon moved for summary judgment dismissing Count II, contending that only fiduciaries that cause plans to enter into prohibited transactions, and not non-fiduciary parties in interest that participate in such transactions, can be liable under Section 502(a)(3) to provide appropriate equitable relief with regard to such transactions. The District Court denied the motion, and held, in line with all the courts of appeals that had addressed the issue, that Section 502(a)(3) authorizes suits against non-fiduciary parties in interest for "appropriate equitable relief," including restitution, in regard to their participation in Section 406(a)(1) prohibited transactions. App. 30a-41a. Subsequently, the District Court certified this question of law for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and the Seventh Circuit accepted the appeal.

The Court of Appeals reversed, creating a six-to-one circuit split on the vital question of employee benefit law



presented here. App. 1a-13a. In concluding that no cause of action will lie under ERISA § 502(a)(3) against non-fiduciary parties in interest to secure equitable relief for their participation in prohibited transactions, the Court of Appeals relied on the wording of ERISA § 406(a)(1), which it saw as limiting liability to fiduciaries, App. 7a-9a; on certain *dicta* in this Court's decisions in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996), App. 9a-11a; and on selected legislative history, App. 11a-12a.

## REASONS FOR GRANTING THE PETITION

### A. The Circuit Courts Are Split

The Court of Appeals acknowledged that its decision created a split among the circuits. App. 13a n.1. Until the present decision, every one of the six courts of appeals that had addressed the question had held that non-fiduciary parties in interest that enter into prohibited transactions are subject to suit for equitable remedies under Section 502(a)(3) of ERISA:[4]

- First Circuit: *Reich* v. *Rowe*, 20 F.3d 25, 31-33 (1st Cir. 1994).

- Third Circuit: *Reich* v. *Compton*, 57 F.3d 270, 285-87 (3d Cir. 1995).

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[4] Some of the cited decisions involved Section 502(a)(5), relating to actions brought by the Secretary of Labor. The pertinent language of Section 502(a)(5) is identical to that of Section 502(a)(3), relating to actions brought by private parties, and this Court has recognized that the two provisions must be interpreted consistently. *See Mertens* v. *Hewitt Associates*, 508 U.S. at 260; *see also, e.g., Reich* v. *Compton*, 57 F.3d 270, 284 (3d Cir. 1995).

- Fourth Circuit: *LeBlanc* v. *Cahill*, 153 F.3d 134, 150-53 (4th Cir. 1998).

- Ninth Circuit: *Steen* v. *John Hancock Mutual Life Insurance Co.*, 106 F.3d 904, 917-18 (9th Cir. 1997); *Landwehr* v. *DuPree*, 72 F.3d 726, 733-34 (9th Cir. 1995); *Concha* v. *London*, 62 F.3d 1493, 1503-04 (9th Cir. 1995), *cert. dismissed*, 517 U.S. 1183 (1996); *Call* v. *Sumitomo Bank*, 881 F.2d 626, 634-35 (9th Cir. 1989); *Nieto* v. *Ecker*, 845 F.2d 868, 873-74 (9th Cir. 1988).

- Tenth Circuit: *Reich* v. *Stangl*, 73 F.3d 1027, 1029-34 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996).

- Eleventh Circuit: *Herman* v. *South Carolina National Bank*, 140 F.3d 1413, 1419-22 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).[5]

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[5] Many district courts have come to the same conclusion. *See, e.g., Quint* v. *Freda*, 1999 U.S. Dist. LEXIS 1384 (S.D.N.Y. Feb. 10, 1999); *Damasco & Associates 401(k) Profit Sharing Plan* v. *Manufacturers Life Insurance Co.*, 1999 U.S. Dist. LEXIS 13654, at *18-*20 (N.D. Cal. Aug. 20, 1999); *Liss* v. *Smith*, 991 F. Supp. 278, 306 (S.D.N.Y. 1998); *Herman* v. *Wolfe*, 1998 U.S. Dist. LEXIS 980, at *9-*10 (N.D. Ill. Jan. 22, 1998); *Mason Tenders District Council Pension Fund* v. *Messera*, 958 F. Supp. 869, 879 (S.D.N.Y. 1997); *Dietz* v. *Cahill*, 935 F. Supp. 223, 229-30 (W.D.N.Y. 1996); *Reich* v. *Polera Building Corp.*, 20 Empl. Ben. Cas. 1100 (S.D.N.Y. Feb. 9, 1996), *Cosgrove* v. *Circle K Corp.*, 915 F. Supp. 1050, 1065 (D. Ariz. 1995); *Reich* v. *Lancaster*, 843 F. Supp. 194, 203 (N.D. Tex. 1993); *Dole* v. *Compton*, 753 F. Supp. 563, 569 n.10 (E.D. Pa. 1990); *Framingham Union Hospital* v. *Travelers Insurance Co.*, 744 F.

(...footnote continued)



As the number of reported decisions suggests, the question at issue here has been thoroughly explored by the lower courts. There is therefore no reason to believe that this Court would benefit from deferring review in order to allow further litigation to develop. The considerations addressed by the Seventh Circuit in reaching its decision – statutory language, prior statements of this Court, and legislative history – are the identical considerations that have been extensively addressed in the many decisions that have come to a contrary conclusion.

*Statutory Language*. In concluding that non-fiduciary parties in interest are immune from suit as participants in Section 406(a)(1) prohibited transactions, the Seventh Circuit placed primary reliance on the fact that Section 406(a)(1) begins with the words, "A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect . . ." – followed by the five enumerated types of prohibited transaction, including two that are clearly applicable here, "sale or exchange, or leasing, of any property between the plan and a party in interest" and "transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan." ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1). The Seventh Circuit concluded, based on the statute's reference to a fiduciary's causing a prohibited

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(. . . continued)
Supp. 29, 33 (D. Mass. 1990); *McDougall* v. *Donovan*, 539 F. Supp. 596, 599 (N.D. Ill. 1982).

We have been unable to locate any decision, other than decisions that were subsequently reversed, which reached the conclusion of the Seventh Circuit herein.

transaction, that Section 406(a)(1) imposes a duty *solely* on fiduciaries that cause plans to engage in such transactions, and that non-fiduciary parties in interest that enter into such transactions with plans *cannot* violate Section 406(a)(1). *See* App. 7a-9a.

What this overlooks, as the courts coming to the opposite conclusion have recognized,[6] is that in a prohibited transaction, a party in interest, which will often be a non-fiduciary, is *necessarily* a counter-party to the fiduciary that enters into the transaction on behalf of the plan. As a result, prohibiting the transaction from the fiduciary's side necessarily entails prohibiting it from the party in interest's side. It is the *transaction* that is prohibited.[7] As the Eleventh Circuit put it in *Herman* v. *South Carolina National Bank*, 140 F.3d at 1421:

> "While § 406 does instruct fiduciaries – typically the plan trustees – not to cause the plan to enter into transactions with 'parties in interest,' § 406 also serves to prohibit transactions between a [plan] and a 'party in interest.' Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a 'party in interest' remains a prohibited transaction under § 406."

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[6] *E.g.*, *LeBlanc* v. *Cahill*, 153 F.3d at 150-51, 153; *Reich* v. *Stangl*, 73 F.3d at 1031.

[7] Moreover, nothing in Section 406(a)(1) says that non-fiduciary parties in interest are *not* liable for participating in prohibited transactions.



*See also Reich* v. *Rowe*, 20 F.3d at 31 n.7; S. (Conf.) Rep. No. 1090, 93d Cong., 2d Sess. 306-20 (1974) (repeated statements that *transactions* are prohibited by Section 406).

Once it is recognized that Section 406(a)(1) prohibits *transactions*, it ineluctably follows that a prohibited transaction is, in the words of Section 502(a)(3), an "act or practice which violates any provision of this title."[8] It then further follows that *any* person, including a non-fiduciary party in interest, can be sued under Section 502(a)(3) to enjoin the transaction or "obtain other appropriate equitable relief."[9]

Other provisions of ERISA and the Internal Revenue Code – which must be read in parallel with ERISA §§ 406(a)(1) and 502(a)(3), *see, e.g.*, *Erlenbaugh* v. *United States*, 409 U.S. 239, 244 (1972) ("individual sections of a single statute should be construed together") – confirm that this is the correct construction of those provisions:

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[8] This Court explained in *Varity Corp.* v. *Howe*, 516 U.S. 489, 512 (1996), that Section 502(a)(3) and its analogue for actions brought by the Secretary of Labor, Section 502(a)(5), create "two 'catchalls,' providing 'appropriate equitable relief' for 'any' statutory violation. This structure suggests that these 'catchall' provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy." Here, as in *Varity*, petitioners "must rely on [Section 502(a)(3)] or they have no remedy at all," and there is no "ERISA-related purpose that denial of a remedy would serve." *Id.* at 515.

[9] There is no dispute that, if an action under Section 502(a)(3) is available, the equitable remedies that can be had include restitution. *See, e.g.*, *Mertens* v. *Hewitt Associates*, 508 U.S. at 260; *LeBlanc* v. *Cahill*, 153 F.3d at 153; *Herman* v. *South Carolina National Bank*, 140 F.3d at 1422.

- *ERISA § 502(i).* That Section 406(a)(1) prohibits prohibited transactions and participation in them by parties in interest, and not just the participation of fiduciaries in such transactions, is made absolutely clear by ERISA § 502(i), 29 U.S.C. § 1132(i), App. 76a-77a, which provides: "In the case of a transaction prohibited by Section 406 by a party in interest with respect to a plan to which this part applies, the Secretary [of Labor] may assess a civil penalty against such party in interest." It is hard to imagine a clearer statement that Section 406(a)(1) prohibits *transactions,* and that parties in interest *are* subject to that prohibition.

- *ERISA § 408(a).* Again, the fact that *transactions*, not just *actions by fiduciaries*, are prohibited by Section 406(a)(1) is made clear in ERISA § 408(a), 29 U.S.C. § 1108(a), App. 75a-76a, which authorizes the Secretary of Labor to grant exemptions "of any fiduciary *or transaction*, or class of fiduciaries *or transactions*, from all or part of the restrictions imposed by section[] 406." (Emphasis added.)

- *Internal Revenue Code § 4975(h).* Still further confirmation that non-fiduciary parties in interest are subject to suit in connection with their participation in prohibited transactions is found in the parallel prohibited-transaction provisions of the Internal Revenue Code. As previously noted, Section 4975 of the Code, 26 U.S.C. § 4975, App. 66a-70a, provides, in subsections (a) and (b), for the imposition of excise taxes on "disqualified persons" who participate in prohibited transactions and are not acting solely in a fiduciary capacity. Subsection (h) of Section



4975 provides that before sending a notice of deficiency with respect to such a tax, the Secretary of the Treasury "shall notify the Secretary of Labor *and provide him a reasonable opportunity to obtain a correction of the prohibited transaction.*" (Emphasis added.) "Correction" is defined in paragraph (f)(5) as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." As several courts have recognized,[10] an action under ERISA § 502(a)(5) – the provision that authorizes suits by the Secretary of Labor to remedy acts or practices that violate ERISA in terms substantially identical to the terms used in Section 502(a)(3) to authorize suits by private persons to remedy such acts or practices – is the only way that the Secretary of Labor could "obtain a correction" of a prohibited transaction by a non-fiduciary party in interest. Section 4975(h) thus necessarily recognizes that Section 502(a)(3) and (5) authorize suits against non-fiduciary parties in interest.

In short, one need not look beyond the words of ERISA and the Internal Revenue Code to conclude, as this Court did in *Commissioner of Internal Revenue* v. *Keystone Consolidated Industries, Inc.*, 508 U.S. 152 (1993), that "Congress' goal [in enacting ERISA § 406(a)(1) and IRC

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10 *E.g., Reich* v. *Stangl*, 73 F.3d at 1034; *Reich* v. *Compton*, 57 F.3d at 286; *Nieto* v. *Ecker*, 845 F.2d at 874 n.6; *McDougall* v. *Donovan*, 539 F. Supp. at 599.

§ 4975] was to *bar categorically a transaction* that was likely to injure [employee benefit plans]" – not just to provide remedies against fiduciaries that cause such transactions to occur. 508 U.S. at 160 (emphasis added). And once it is established that such transactions are prohibited, it follows that parties in interest can be sued for appropriate equitable relief, including restitution, under Section 502(a)(3).

*The Mertens and Lockheed Decisions.* The lower courts have also thoroughly debated the significance, for the instant question, of this Court's decisions in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), and *Lockheed Corp.* v. *Spink*, 517 U.S. 882 (1996).

*Mertens* stated, in *dicta* that have been widely followed by the lower courts,[11] that no cause of action is available under ERISA against a non-fiduciary for assisting a fiduciary in violating its fiduciary obligations under the statute. The Seventh Circuit saw this statement as support for its conclusion that there is also no cause of action against a non-fiduciary party in interest for participation in a Section 406(a)(1) prohibited transaction.

The other decisions of the courts of appeals have squarely addressed and rejected this reading of *Mertens*. Every one of the six circuits that has reached a conclusion contrary to that of the Seventh Circuit in the instant case has issued a decision that post-dates and discusses *Mertens*. *Reich* v. *Rowe*, 20 F.3d at 31-33; *Reich* v. *Compton*, 57 F.3d at 285; *LeBlanc* v. *Cahill*, 153 F.3d at 151-53; *Landwehr* v. *DuPree*, 72 F.3d at 734; *Reich* v. *Stangl*, 73 F.3d at 1031-32;

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[11] *See Aull* v. *Cavalcade Pension Plan*, 988 F. Supp. 1360, 1365 (D. Colo. 1997) (citing cases).



*Herman* v. *South Carolina National Bank*, 140 F.3d at 1421-22. These decisions point out that the structure of ERISA's fiduciary-duty provisions, particularly Sections 405, 409 and 502(a)(2), 29 U.S.C. §§ 1105, 1109, 1132(a)(2), differs fundamentally from the structure of the provisions at issue here. In particular, because fiduciary violations do not have necessary counter-parties as prohibited transactions do, and because Congress specifically addressed only one type of involvement in fiduciary violations – co-fiduciary conduct (ERISA § 405, 29 U.S.C. § 1105) – while not addressing other types, *Mertens'* conclusion that there is no cause of action under ERISA for a non-fiduciary's participation in a fiduciary violation is in no way dispositive of the question presented here.

Indeed, the *Mertens* Court went out of its way to observe that Section 406 is a provision that can be read as "imposing obligations upon nonfiduciaries" (508 U.S. at 253-54 & n.4), and took pains to *contrast* the treatment of non-fiduciary parties in interest under Sections 406 and 502 from its holding as to liability for participation in fiduciary violations:

> "Professional service providers such as actuaries . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming non-fiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees."

508 U.S. at 262.[12]

*Lockheed* contains a footnote harmonizing these *dicta* from *Mertens* with *Lockheed*'s holding that, by the terms of Section 406, prohibited transactions must be transactions caused by fiduciaries. *See* 517 U.S. at 889 n.3. (The present transactions satisfy that causation requirement, because NISA, as investment manager with discretionary authority over investment decisions, was a fiduciary and caused the transactions to occur.) Though the Seventh Circuit strained to find support for its decision in this footnote (*see* App. 10a-11a), and post-*Lockheed* decisions of other courts have strained in the opposite direction (*see, e.g.*, *LeBlanc* v. *Cahill*, 153 F.3d at 152; *Herman* v. *South Carolina National Bank*, 140 F.3d at 1422 n.14), the *Lockheed* footnote is perhaps best read as favoring neither side of the present dispute. On the one hand, it does observe that the *Mertens* comments were *dicta*, but on the other hand, it also recognizes that a number of courts of appeals have relied on those *dicta* as support for finding a cause of action against parties in interest that participate in prohibited transactions, and it does not suggest that those courts were in error.

*Legislative History.* The Seventh Circuit placed substantial reliance on the fact that one of the two bills that were substantially rewritten in conference to become ERISA – the Senate bill – had a provision, not ultimately enacted, that would have specifically imposed liability on parties in interest for participating in prohibited transactions. *See* App. 12a; H.R. 2, § 511, 93d Cong., 2d Sess. (adding Section 15(i)

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12 The answer to the Court's caveat as to whether non-fiduciaries can be sued under Section 502(a)(3) is that nothing in that statutory provision restricts to only fiduciaries (or restricts in any other way) the categories of persons that can be sued to redress an "act or practice which violates" ERISA Title I.



to Welfare and Pension Plans Disclosure Act) (as passed by the Senate on Mar. 4, 1974), *reprinted in* 3 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 3780 (Senate Comm. Print 1976) ("*Legislative History*"). But the court ignored the counter-point that was presented to it on briefs: that the conferees, in moving away from highly particularized enforcement provisions, adopted Section 502's broad enforcement language, which expanded on *both* the Senate and House bills and specifically added the authorization of "other appropriate equitable relief" for *any* "act or practice that violates" the statute. *Compare* H.R. 2, § 503(e), 93d Cong., 2d Sess. (as passed by the House on Feb. 28, 1974), *reprinted in* 3 *Legislative History* at 4047, *and* H.R. 2, § 693, 93d Cong., 2d Sess. (as passed by the Senate on Mar. 4, 1974), reprinted in 3 *Legislative History* 3816-17, *with* ERISA § 502(a). *See also* H.R. (Conf.) Rep. No. 1280, 93d Cong., 2d Sess. 327 (1974) (conferees expanded Section 502 to allow "an action for breach of a fiduciary duty *or* to enjoin any act or practice which violates the provisions of title I of the Act *or* to obtain any other appropriate relief to enforce any provision of that title") (emphasis added); *Reich* v. *Stangl*, 73 F.3d at 1032-34 (legislative history repeatedly stresses policy of protecting plan assets).

*Sensible Statutory Construction.* Statutes should be construed, where the language permits, to make sense – to advance in a sensible way the basic policies sought to be promoted by the overall statutory scheme, and not to clash with them for no good reason. *E.g., Varity Corp.* v. *Howe*, 516 U.S. at 513; *John Hancock Mutual Life Insurance Co.* v. *Harris Trust & Savings Bank*, 510 U.S. 86, 94-95 (1993); *United States National Bank of Oregon* v. *Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 455 (1993). The courts that have found a cause of action to be available under Section 502(a)(3) (and (5)) against non-fiduciary parties in interest that participate in prohibited transactions

have stressed that it is improbable that Congress could have intended to exclude such a cause of action, as the result would potentially be to make it "difficult or impossible to undo such illegal transactions." *Nieto* v. *Ecker*, 845 F.2d at 874; *accord*, *LeBlanc* v. *Cahill*, 153 F.3d at 152-53; *Reich* v. *Compton*, 57 F.3d at 286.[13] Though they were drawn to its attention, the Seventh Circuit disregarded such considerations of sensible statutory construction.

* * *

In sum, the circuit split in the present action reflects fully-developed positions and counter-positions on a key issue of statutory interpretation. The Court should grant certiorari to resolve this important disagreement among the circuits.

### B. The Question Presented Is of the Utmost Importance to the Administration of Employee Benefit Plans and the Vindication of Plan Beneficiaries' Rights

The question presented here has, as we have seen, been extensively litigated, reflecting its great and continuing

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13 *See also*, *e.g.*, *Reich* v. *Stangl*, 73 F.3d at 1031 ("It would make little sense to grant the Secretary [the] broad enforcement powers [of Section 502(a)(5)] to stop ongoing violations of ERISA and then to limit the Secretary's power to recover plan assets acquired through these same violations. Such an interpretation of section 502(a)(5) would effectively create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring."); *Landwehr* v. *DuPree*, 72 F.3d at 734 ("It is one thing to suggest, as does *Mertens*, that a nonfiduciary may not to be held liable for participating in another's breach of fiduciary duty. It is quite another to say that a non-fiduciary may not be held liable for his own wrongful conduct . . . .").



importance to the administration of employee benefit plans throughout the nation. Controlling prohibited transactions through a flat, broad prohibition, tempered by the careful granting of exemptions, was one of the fundamental purposes for which ERISA was enacted in 1974.

The Seventh Circuit's decision, by rendering non-fiduciary parties in interest within the jurisdiction of that circuit effectively immune from the civil recovery of ill-gotten gains – at the instance of *either* the victimized plan or its beneficiaries or fiduciaries *or* the Secretary of Labor – would open a loophole that could undermine that basic policy goal.[14] The party in interest will often be the only party with significant assets. Yet, civil recovery from that party – the party capable of undoing the wrong, and, often, the party most responsible for the wrong – will be stymied. As a result of ERISA's broad pre-emption of state law, ERISA § 514, 29 U.S.C. § 1144, plan beneficiaries may well be left without *any* remedy – a worse position than they would have been in had ERISA never been enacted.

There is also a clear need for nationwide uniformity in employee benefit plan policy. Many plans have nationwide or extensive multistate operations. Employee benefit plans should not have to adopt one set of enforcement policies for the Seventh Circuit and another for the rest of the country. And employees' and retirees' rights should not

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14 Eliminating private civil remedies would still leave it open for the government to seek to undo prohibited transactions through ERISA § 502(i) penalties or IRC § 4975 excise taxes, depending on the type of plan involved. *See* page 5, note 2 *supra*. But the government's enforcement resources are limited. The incidence of unremedied prohibited transactions is sure to be reduced if the parties with the greatest incentive to secure relief – the affected plan, and its beneficiaries and fiduciaries – are able to sue for restitution.

depend on vagaries of geography or available venues (*see* ERISA § 502(e), 29 U.S.C. § 1132(e)).

These considerations, too, weigh strongly in favor of granting certiorari in this case.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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(2)

No. 99-579

IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## APPENDIX

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**APPENDIX A**

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 98-1812

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

Plaintiffs-Appellees,

v.

SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,

Defendants-Appellants.

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92-C-5883—Joan Humphrey Lefkow, Magistrate Judge.

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**ARGUED NOVEMBER 30, 1998—DECIDED JULY 6, 1999**

Before FLAUM, KANNE, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The Employee Retirement Income Security Act (ERISA) prohibits certain transactions between an employee pension plan and its service providers who are deemed "parties in interest" under the Act. In this case we decide whether ERISA provides a private cause of action against a party in interest for engaging in such prohibited transactions.

In the late 1980's defendant Salomon Brothers Inc. set up financing for two motel chains, Motels of America, Inc. and Best Inns, Inc., to acquire large blocks of motel properties throughout the country. In four separate transactions the companies initially sold mortgage notes secured by the acquired properties to Salomon, who in turn sold the notes to institutional investors. In exchange for its services Salomon received a participation interest in each group of motel properties which entitled it to a percentage of the "net cash flow" generated by the properties plus a percentage of any appreciation in the properties' value.

During this same time period Salomon also provided broker-dealer services to plaintiff Ameritech Pension Trust (APT), which holds assets for Ameritech Corporation's employee pension plans. Ameritech had appointed National Investment Services of America, Inc. (NISA) to serve as investment manager to APT. In 1987 Salomon offered to sell its participation interests in the Motels of America and Best Inns motel properties to APT as an investment. After extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motel properties for over $20 million. In the early 1990's the nationwide market for hotel and motel real property collapsed, and APT suffered a considerable loss on its investment.

In 1992 APT's newly appointed trustee, Harris Trust and Savings Bank, sued Salomon (and a related company, but we can disregard that detail), seeking to hold it liable for APT's loss on the motel property participation interests. Among the 12 claims in the initial complaint were three ERISA claims relevant here: (1) a claim that Salomon was a fiduciary that had breached its duties to the plan under Title 29 U.S.C. § 1104; (2) a claim that Salomon was a fiduciary that caused the plan to engage in prohibited transactions under § 1106(a); and (3) an alternative claim that Salomon as a nonfiduciary



had knowingly participated in a breach of a § 1104 duty by plan fiduciaries.

After the plaintiffs filed suit, we held in another case, based on Supreme Court dicta, that ERISA does not provide a private cause of action against a nonfiduciary for participation in a fiduciary's breach of duty. *See Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (1994); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). This holding effectively knocked out the plaintiffs' third claim. Evidently, the plaintiffs were also fearful that the district court would find that Salomon was not a plan fiduciary, so they amended their second claim to cite Salomon for participating as a nonfiduciary party in interest in a transaction prohibited by § 1106.

Salomon moved for summary judgment on all three ERISA claims, and the plaintiffs moved for summary judgment on their § 1106 claim. As the plaintiffs had feared, Magistrate Judge Joan Humphrey Lefkow, sitting by consent of the parties, first determined that Salomon was not a plan fiduciary and found for Salomon on the first claim. As expected, she also found that the holding in *Continental Casualty* eliminated the third claim against Salomon for nonfiduciary participation in a fiduciary breach. Judge Lefkow denied summary judgment on the newly constituted § 1106 claim, however, finding that ERISA does provide a private cause of action against nonfiduciaries who participate in a prohibited transaction.

After the Supreme Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), Salomon moved for reconsideration or, in the alternative, certification for interlocutory appeal on the sole remaining claim. In *Lockheed* the Supreme Court held that a § 1106 violation occurred only when a fiduciary had caused the plan to enter into the prohibited transaction. The district court declined to reconsider but granted certification for appeal of its denial of summary judgment. We review the denial of a motion for summary

judgment *de novo*. *See Hillman v. Resolution Trust Corp.*, 66 F.3d 141, 143 (7th Cir. 1995).

In a part of ERISA titled "Fiduciary Responsibility" the nature of a fiduciary's relationship to a qualified employee benefit plan is spelled out in detail. Title 29 U.S.C. § 1104 defines the duty owed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

29 U.S.C. § 1104(a)(1). Section 1109 then makes a fiduciary personally liable for breaching this duty and describes the remedies available for a breach. Another part of the Act titled "Administration and Enforcement" provides a specific civil enforcement provision against fiduciaries who breach their duties—the Secretary of Labor, plan beneficiaries, and plan fiduciaries can sue fiduciaries for "appropriate relief under [§ 1109]." 29 U.S.C. § 1132(a)(2). ERISA also broadly allows the Secretary of Labor, plan fiduciaries, and plan beneficiaries to sue "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3). This last provision and the phrase "other appropriate equitable relief" has been the cause of much consternation in the courts.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court considered a claim by plan beneficiaries against a nonfiduciary for knowingly participating in a fiduciary's breach of duty. The nonfiduciary defendant had acted as actuary for the Kaiser Steel Retirement Plan. When



Kaiser began phasing out its steel operations a large number of employees took early retirement, and the defendant failed to change the plan's actuarial assumptions to reflect the costs of the unusually large influx of retirees. As a result, Kaiser failed to adequately fund the plan. The plaintiffs brought their action under the "other appropriate equitable relief" clause of § 1132(a)(3). The *Mertens* parties and the lower courts all assumed that § 1132(a)(3) provided a cause of action against nonfiduciaries for knowingly participating in a fiduciary breach, and the only question raised before the Supreme Court was whether money damages could constitute "other appropriate equitable relief." *See Mertens*, 508 U.S. at 251. After extensive ruminations on the nature of equity, a 5-4 majority held that money damages could not be considered equitable relief for the purposes of § 1132(a)(3).

More importantly for our purposes, Justice Scalia, writing for the majority, made clear the Court's doubts that § 1132(a)(3) provides a cause of action against nonfiduciaries for participating in a fiduciary breach because "no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.* at 254. There had been such a cause of action under the common law of trusts upon which ERISA was largely based. *See id.* Justice Scalia reasoned, however, that because Congress undoubtedly knew about the common law cause of action, it is all the more unlikely that the omission of an explicit cause of action in ERISA was inadvertent. *See id.* The "statute's . . . detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *See id.* (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)). We adopted Justice Scalia's rationale as the law of this circuit in *Continental Casualty*, 33 F.3d at 757.

On appeal, the plaintiffs have wisely abandoned their claim against Salomon for participating in a breach of fiduci-

ary duty under § 1104. Instead, they cite § 1106, which addresses "Transactions between plan and party in interest." In pertinent part, § 1106 provides:

> (a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> . . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

29 U.S.C. § 1106(a). Section 1106 prohibits plan fiduciaries from engaging in these transactions because they create a high potential for conflicts of interest. One example of a party in interest is "a person providing services to such plan." 29 U.S.C. § 1002(14)(B). For the purposes of our review we assume that at all relevant times Salomon was a party in interest vis-a-vis APT and that § 1106 therefore prohibited the sale of Salomon's motel property participation interests to APT (two points which Salomon reserves the right to dispute should this case go to trial). The plaintiffs argue that Salomon violated the Act by engaging in a transaction prohibited by § 1106. Therefore, the plaintiffs may seek "appropriate equitable relief," including monetary restitution, against Salomon under § 1132(a)(3).

Judge Lefkow agreed and held that § 1106 imposes a duty on nonfiduciary parties in interest to avoid prohibited transactions. This approach has found support in other circuits. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).



Our analysis begins, as it must, with the statutory language. The plaintiffs and the district court focused on the broad language of § 1132(a)(3) which allows plan fiduciaries like the plaintiffs to seek "other appropriate equitable relief" for any act which violates ERISA. The "act" alleged here is Salomon's participation in a transaction prohibited by § 1106. Therefore, if Salomon is indeed a party in interest and if it did participate in such a transaction, the plaintiffs can seek restitution for the plan's investment losses.

Salomon focuses instead on the language of § 1106 and its statutory context. Salomon points out that § 1106 by its terms only directly governs the conduct of fiduciaries ("a fiduciary . . . shall not cause . . ."), and therefore only a fiduciary can violate § 1106. Salomon's argument is strengthened when we consider the context of § 1106. Title 29 U.S.C. §§ 1101-1114 deal with "Fiduciary Responsibilities." Section 1104 describes the broad fiduciary standard of care that was required at common law, and § 1106 imposes a new statutory fiduciary duty—the duty not to cause the plan to enter into certain prohibited transactions. Section 1109 makes the fiduciary and only the fiduciary liable for breaches of the duties described in the "Fiduciary Responsibility" part of the Act. Finally, Section 1132(a)(2) provides a private right of action for appropriate relief under § 1109.

In *Mertens* Justice Scalia reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under § 1104 there was no such cause of action. The same logic applies to § 1106 because it simply describes another variety of fiduciary breach. Nothing explicitly makes nonfiduciaries liable for participating in a breach of that duty. The plaintiffs place great weight on the fact that § 1106 mentions "parties in interest," but the fact of the matter is that the section, by its plain terms, does not regulate their conduct. Therefore, § 1106 imposes no explicit duty on parties in interest. In *Continental Casualty* we adopted Justice Scalia's position

that where ERISA does not expressly impose a duty, there can be no cause of action. There seems to be no material distinction between that case and this.

In *Continental Casualty* the fiduciaries of a union pension fund obtained a one-year extension of their fiduciary liability insurance policy. The extension cost $750,000 and provided additional coverage of only $1 million. Entering into such a bad deal was a clear breach of fiduciary duty under § 1104. The Department of Labor sought relief for the plan against the fiduciaries under § 1109 and § 1132(a)(2). It also sought restitution from the insurance company which had participated in the fiduciaries' breach. The Labor Department argued that this was appropriate equitable relief under § 1132(a)(3). Relying on *Mertens*, we denied the claim against the insurance company because neither § 1104 nor § 1109 explicitly imposed liability on nonfiduciaries. Section 1132(a)(3) as a remedial statute only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act.

The same logic applies to this case. Section 1106 falls under the "Fiduciary Responsibility" part of the Act, and § 1109 makes fiduciaries liable for violating § 1106. The mere fact that § 1106 mentions "parties in interest" when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction.

The only viable distinction the plaintiffs raise between the position of participating parties in interest under § 1104 and participating parties in interest under § 1106 is that one of the Act's remedial provisions imposes civil penalties on parties in interest when they participate in a transaction prohibited by § 1106: "In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary [of Labor] may assess a civil penalty against such party in interest." 29



U.S.C. § 1132(i). The fact that Congress saw fit to allow the Labor Department to impose such a penalty, however, only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking. Section 1132(i) allows the Labor Department to impose a civil penalty of up to 5 percent of the value of the transaction if the party in interest is willing to "correct" the transaction in a manner prescribed by the Department. If the party in interest refuses to correct the transaction, the penalty can be increased to 100 percent of the transaction amount. The Supreme Court in *Mertens* determined that Congress did not intend to impose civil liability on parties in interest for participating in a breach of fiduciary duty because ERISA does not contain an explicit statement of nonfiduciary participation liability. Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction. Section 1132(i) does provide a penalty against such parties in interest, but that penalty is imposed solely at the discretion of the Labor Department. If Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of cofiduciaries. *See* 29 U.S.C. § 1105.

The plaintiffs cite language in *Mertens* which they believe supports their position that parties in interest are liable for participation in prohibited transactions. In *Mertens* Justice Scalia suggested that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . and (assuming nonfiduciaries can be sued under [§ 1132(a)(3)]) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees." *Mertens*, 508 U.S. 248, 262. This language, however, does not get the plaintiffs as far as they would like. First, the statement that professional

service providers like Salomon must disgorge assets and profits gained from a § 1106 transaction is unremarkable. As discussed above, § 1132(i) forces parties in interest to correct such transactions at peril of a Labor Department penalty.

Second, Justice Scalia's remark that "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" must be understood in the context of the unique posture of the case the Supreme Court had before it. The parties and lower courts in *Mertens* had all assumed that § 1132(a)(3) provided relief against nonfiduciaries for participation in a fiduciary breach. Therefore, the Supreme Court was asked to determine only whether damages could be considered "appropriate equitable relief." A majority of the Court, however, expresses strong doubts as to whether there even was a cause of action under § 1132(a)(3) against nonfiduciaries. *See Mertens*, 508 U.S. at 254-55. The Court then proceeded to decide the issue of whether damages could be equitable, technically leaving open the issue of whether § 1132(a)(3) provided a cause of action against nonfiduciaries. Thus, the parenthetical phrase "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" was stating a big assumption—an assumption Justice Scalia had previously made clear that he and a majority of the Court were unwilling to make. Justice Scalia's reasoning is now the law of this circuit, and the "assuming" language can no longer support the plaintiffs' reading of the statute.

Both parties also cite the more recent Supreme Court decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), to support their respective positions. Salomon cites the case for the proposition that only fiduciaries can be held liable under § 1106. In *Lockheed* the plaintiff beneficiary sued his employer, the plan sponsor, for engaging in a transaction prohibited by § 1106. The Ninth Circuit held that the plan sponsor in this case was not a fiduciary but was still liable as a party in interest under § 1106. The Supreme Court reversed. Justice Thomas, writing for a unanimous Court, held that proof that a fiduciary caused the plan to enter into



the prohibited transaction was a necessary predicate to § 1106 liability. *See id.* at 891. Once the Court had determined that the defendant sponsor was not a fiduciary, there was no other potential fiduciary to cause the transaction. However, Justice Thomas also seemed to leave open the possibility that a nonfiduciary party in interest could be held liable for a prohibited transaction if a fiduciary caused the plan to enter into the transaction:

> The Court of Appeals thus was not necessarily wrong in saying that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA"; but the only transactions rendered impermissible by [§ 1106] are transactions caused by fiduciaries.

*See id.* at 889 n.3. The plaintiffs seize on this rationale to support their argument that nonfiduciaries are liable under § 1106, but the opinion really provides no guidance one way or the other. "Not necessarily wrong" does not mean "right." Furthermore, Justice Thomas went out of his way to point out that the passages from *Mertens* that the Ninth Circuit relied on in finding that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA" were dicta. *See id.* At most, the "not necessarily wrong" statement makes it clear that in *Lockheed* the Court was once again not addressing the issue of party-in-interest liability under § 1106. Such liability was still an open question after *Lockheed* as far as the Supreme Court was concerned.

The plaintiffs also find support for their reading of § 1106 in ERISA's legislative history. A Congressional Conference Committee Report suggests that § 1106 would prohibit "plan fiduciaries and parties in interest" from engaging in the listed transactions, implying that both parties to the transaction would be liable. H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5087. But Salomon's analysis of the legislative history is more

convincing. The Senate and the House of Representatives both passed versions of ERISA. The House bill did not explicitly impose liability on nonfiduciaries; the Senate bill did:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay the fund any profits realized by him from such transaction.

H.R. 2, 93rd Cong., 2d Sess. § 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) (not enacted), reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3780 (1976). The Conference Committee staff charged with reconciling the House and Senate versions specifically recommended dropping the party in interest liability provision. Summary of Differences Between the Senate Version and the House Version of H.R. 2—To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93rd Cong. Sess. (1974), *id.* at 5259. And Congress did so when it passed the final bill into law. While we hesitate to give too much weight to legislative history, this record suggests that Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so.

Whether there is a private cause of action against nonfiduciary parties in interest under § 1106 is a difficult issue. As we have noted, at least three other circuits have found such a cause of action. Ultimately, the dicta in *Mertens* adopted by this court in *Continental Casualty* provides the most guidance. Applying Justice Scalia's rationale to § 1106, we do not think it imposes liability on nonfiduciary parties in interest any more than § 1104 does. Like § 1104, § 1106 comes under the heading "Fiduciary Responsibility."



The plaintiffs argue that because it is entitled "Prohibited Transactions" § 1106 regulates the conduct of all parties to the transaction. The prohibitory language of the section itself is clear, however: "fiduciaries shall not . . . ." Causing a qualified plan to engage in one of these transactions is simply another species of fiduciary breach. A nonfiduciary cannot violate § 1106 and therefore cannot be liable under § 1132(a)(3) for participating in a § 1106 transaction. Section 1132(i) provides the only express penalty against nonfiduciary parties in interest who participate in a fiduciary's breach of his or her responsibility under § 1106. The Supreme Court has repeatedly stated its reluctance to infer ERISA causes of action where the statute does not expressly provide for them, and we decline to do so here.

With all due respect to the circuits[1] who have considered this issue, we find no convincing reason to distinguish § 1106 from § 1104 for the purposes of nonfiduciary liability. The decision of the district court is therefore reversed and summary judgment is granted to Salomon Brothers.

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[1] Because this opinion creates a circuit split, it has been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e). Judge Coffey did not participate in the circulation due to a conflict. All other judges voted not to rehear the case en banc except Judge Ripple who voted to grant rehearing en banc.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION and JOHN A. EDWARDSON, Plaintiffs, | ) | |
| vs. | ) | No. 92 C 5883 |
| SALOMON BROTHERS, INC. and SALOMON BROTHERS REALTY CORP., Defendants. | ) | |

### MEMORANDUM DECISION

Joan H. Lefkow, Magistrate Judge:

Plaintiffs, Harris Trust and Savings Bank, as Trustee for Ameritech Pension Trust ("APT"), Ameritech Corporation ("Ameritech") and John A. Edwardson, seek recovery from Salomon Brothers, Inc. and Salomon Brothers Realty Corporation (collectively "Salomon") for alleged violations of various provisions of the Employee Retirement Income Security Act ("ERISA") and several state laws. Salomon has filed two counterclaims seeking contribution from Ameritech. Both sides have filed motions for summary judgment with respect to portions of the Second Amended Complaint ("complaint"): cross motions are pending with respect to count II which alleges liability based on Salomon's participation in transactions that are prohibited under ERISA, and



Salomon further seeks summary judgment with respect to counts I and III of the complaint which allege other ERISA violations.[1] Plaintiffs in turn seek summary judgment on Salomon's counterclaims.

### PROCEDURE ON SUMMARY JUDGMENT

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions and affidavits that are part of the record. Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, (1986). It may meet this burden without coming forward with affirmative evidence to negate the nonmovant's claim if it can show the absence of evidence that would support an essential element of the nonmoving party's case. *Id.*, 106 S. Ct. at 2552-53. In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing

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[1] The court previously dismissed counts IV through VII, XI and XII of the complaint. *See Harris Trust and Savings Bank v. Salomon Brothers, Inc.*, 832 F. Supp. 1169 (N.D. Ill. 1993)(Aspen, J.). As a result, only counts I through III (the ERISA claims) and counts VIII through X (the state law claims) remain at issue. Although Salomon has separately moved for summary judgment with respect to the state law claims, the parties have agreed to defer briefing that motion until after this decision with respect to the federal claims. Also pending are Salomon's motions to strike certain evidentiary items that plaintiffs have offered in support of their motion regarding count II and in opposition to Salomon's motion on the federal claims.

that there is a genuine issue for trial. *Id.* at 324, 106 S. Ct. at 2553. A material fact must be outcome determinative under the governing law. *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991).

Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983), the non-moving party's evidence is to be believed and all reasonable inferences from the facts must be viewed in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984). Because plaintiffs and defendants have filed cross motions with respect to count II, the court must rule on each party's motion individually, determining in each case whether judgment may be entered in accordance with the standard set forth in Rule 56. *Wausau Ins. Co. v. Valspar*, 594 F. Supp. 269, 270 (N.D. Ill. 1984).

## FACTUAL BACKGROUND[2]

Ameritech sponsors and administers two pension plans, which qualify as employee pension benefit plans under ERISA. The plans are funded through APT, for which Harris is a directed trustee. Edwardson was a member of Ameritech's Asset Management Committee, the committee which Ameritech has authorized to act for the company in managing and administering APT. Each plaintiff is a fiduciary of APT within the meaning of ERISA.

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[2] Additional factual detail surrounding the transactions at issue can be found in Judge Aspen's two prior opinions in this matter. *See* 832 F. Supp. 1169 (N.D. Ill. 1993) and 813 F. Supp. 1340 (N.D. Ill. 1992). The court has assumed the reader's familiarity with those decisions. Moreover, because of the variety of legal issues involved, a significant number of facts are addressed as needed in the following sections.



During the relevant time period, Ameritech, through its Asset Management Committee, appointed National Investment Services of America, Inc. ("NISA") to serve as the investment manager for APT's dedicated bond fund ("DBF") and, as a result, delegated investment decisions concerning the assets within that portfolio to NISA.

Salomon Brothers, Inc. is a Delaware corporation engaged in the business of investment banking and underwriting securities. At the time at issue herein Salomon Brothers, Inc. had expertise and experience related to the hotel industry. Salomon Brothers Realty Corp. is a New York corporation which is affiliated with Salomon Brothers, Inc. Both corporations are owned by Salomon Brothers Holding Company, Inc. During the 1980's and thereafter, Salomon served as a broker-dealer on numerous debt and equity transactions for the plans whose assets APT holds.

On three separate occasions in 1987, 1988 and 1989, Motels of America, Inc. ("MOA") acquired various motel properties pursuant to financing set up by Salomon. Essentially, MOA issued mortgage notes secured by the motel properties and Salomon acting as principal, purchased all the notes for later resale to various institutional investors. At the closing of each of these transactions, MOA paid Salomon for its services. A portion of the fee was in cash and MOA also entered into a written fee agreement which gave Salomon certain rights to participate in the net cash flow, sale or refinancing proceeds, and property appreciation associated with the motel properties that MOA had acquired ("Fee Agreements I-III"). In October 1989, Best Inns, Inc. acquired nine hotel properties pursuant to a similar financing plan arranged by Salomon. At the closing of the transaction, Best Inns and Salomon also entered into a fee agreement ("Fee Agreement IV").

In 1987, Salomon offered to sell APT its interest in Fee Agreement I. Negotiations ensued in which Salomon pro-

vided a confidential offering memorandum and advocated the fee agreement as an appropriate and advantageous investment for APT. At some point, either Ameritech or NISA, acting in its capacity as investment manager, requested that Salomon retain a partial interest in the Fee Agreement. This request was made because NISA lacked the ability to evaluate MOA on a continuing basis and it wanted to take advantage of Salomon's claimed expertise in this area. In effect, there was a desire to keep Salomon's interests aligned with APT's to ensure that Salomon would continue to receive and evaluate information relating to the soundness of the Fee Agreement as an investment and to encourage Salomon to provide continuing advice regarding the investment to APT. Plaintiffs have submitted evidence that, as part of the transaction, Salomon in fact orally agreed to monitor MOA's and Best Inn's financial performance for APT/NISA and to provide information regarding that performance on an on-going basis.[3] On October 28, 1987, APT purchased 95% of Salomon's interest in Fee Agreement I. In 1988, after Salomon received Fee Agreement II, Salomon approached APT/NISA to purchase an interest in it. APT purchased 100% of Fee Agreement II.

In fall of 1989 Salomon again approached APT about purchasing an interest in Fee Agreement III. Salomon failed, however, to pass on certain adverse information concerning the performance of the underlying MOA properties, as well as adverse developments affecting the value of Fee Agreements I and II. On December 22, 1989, APT purchased 95% of Salomon's interest in Fee Agreement III and, on that same

[3] The parties dispute the existence of any alleged oral agreement to monitor the Fee Agreements. Even if it did engage in monitoring activities, Salomon further disputes whether it was acting in its own interests or on behalf of APT.



day, purchased 95% of Salomon's interest in Fee Agreement IV relating to the Best Inns properties.

The purchase of each participation interest in the Fee Agreement was effected pursuant to a written Assignment. Each Assignment sets forth the percentage interest to be assigned and the amount to be paid in consideration for the assignment and transfer of that interest. It also sets forth certain representations and warranties of the assignor and assignee. One of the APT's representations was that APT had "conducted an independent investigation of [MOA or Best Inns]" and that APT "has not relied upon any representation or warranty . . . by [Salomon] . . ., except as expressly set forth in Section 3 of this Assignment." The Assignment further contains an integration clause providing

> This assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

Plaintiffs further submit that during negotiations for and after the closing of the Fee Agreement transactions, Salomon made numerous falsely positive representations regarding MOA and Best Inns. Salomon also failed to disclose information regarding performance declines and other facts which would have alerted plaintiffs to the precarious condition of the investments. Thus, despite Salomon's representations to the contrary, the Fee Agreements were virtually worthless. Both MOA and Best Inns are bankrupt.

## ANALYSIS

ERISA is a comprehensive statute designed to protect employee benefit plans. In furtherance of its goals, statute designates certain parties as plan fiduciaries, 29 U.S.C. § 1002(21), and imposes personal liability on them for any injury to the plan resulting from a breach of their fiduciary duties. 29 U.S.C. § 1109(a). ERISA also designates other persons as "parties in interest" and specifically prohibits plan fiduciaries from engaging in certain transactions with parties in interest. *Id.* § 1106. Section 1132 then sets forth a variety of enforcement provisions describing the circumstances under which the Secretary of Labor, as well as plan participants, beneficiaries and fiduciaries, may initiate civil actions to redress violations of the act.

### Count I

In count I, plaintiffs allege that Salomon is a fiduciary of APT within the meaning of ERISA § 1002(21) and that Salomon's sale of the Fee Agreement participation interests to APT, as well as Salomon's failure to subsequently monitor the investment breached fiduciary duties that Salomon owed to APT. Salomon contends that plaintiffs have failed to offer any admissible evidence that Salomon was a fiduciary of APT and, further, that the undisputed evidence establishes that it was not such a fiduciary.

A person will be deemed to be a fiduciary with respect to an ERISA plan

> to the extent that (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .



29 U.S.C. § 1002(21)(A). In keeping with ERISA's remedial goals, the courts liberally construe the word "fiduciary" to be more rather than less inclusive. Whether a person qualifies as a fiduciary must be judged according to objective standards. *Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 291-92 (7th Cir. 1989). If the requirements of the statute and the regulations promulgated thereunder are met, it makes no difference whether the parties involved subjectively believe that a fiduciary relationship exists. *Id.* Although plaintiffs claim that Salomon qualifies as a fiduciary under both statutory definitions, evidence that Salomon fits within either definition is sufficient to prevent entry of summary judgment against plaintiffs. As a result, the court will separately consider the two standards.

a. Discretionary Authority or Control

Plaintiffs contend that summary judgment is inappropriate because there is a question of fact whether Salomon had discretionary authority or control respecting the management of a portion of APT's assets. In support of this contention, plaintiffs point to evidence that before NISA decided to invest APT's assets in the Fee Agreements, NISA sought and obtained Salomon's oral agreement to continually monitor the investments' performance on behalf of APT/NISA and NISA required Salomon to retain a 5% interest in three of the four Fee Agreements. Plaintiffs' evidence indicates that NISA insisted on these conditions to insure that Salomon's interest would be aligned with APT's interest and, therefore, "Salomon would provide NISA/APT with whatever information or decisions it needed." *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 14. In short, NISA believed it lacked the ability to evaluate the fee agreements on an ongoing basis and wanted to take advantage of Salomon's claimed expertise in the area. Salomon responds that any evidence relating to an alleged oral agreement to monitor is barred by the parol evi-

dence rule, but even if such an agreement existed, it did not provide Salomon with the type of discretionary control over APT's assets that creates a fiduciary relationship within the meaning of ERISA § 1002(21).

In *Farm King*, the Seventh Circuit pointed out that the cases finding a fiduciary relationship based on discretionary control over the management of an employee benefit plan or its assets had a common theme, namely, "the authority to exercise control unilaterally over a portion of a plan's assets, not merely to propose investments." *Farm King*, 884 F.2d at 292. There, the court concluded that a brokerage firm did not have the requisite discretion despite evidence that over the course of four years, the brokerage firm's representatives had had complete discretion in selecting and presenting securities to the plan, the firm had made recommendations regarding various investments and the plan's trustees had purchased securities almost exclusively from the brokerage firm. *Id.* The lesson of *Farm King* is that "discretionary control" requires something more than influential advice, it requires proof that an alleged fiduciary actually exercised some amount of decision-making power with respect to the plan's assets or had the authority to do so. *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991). While proof that the plan has specifically delegated decision-making authority to the alleged fiduciary is not required, there must, at a minimum, be some indication that the alleged fiduciary's influence has so transcended normal bounds that it effectively has caused the plan's trustees to abdicate their independent decision-making powers to the alleged fiduciary. *See e.g., Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993); *Reich v. McManus*, 883 F. Supp. 1144, 1149 (N.D. Ill. 1995)(summary judgment inappropriate where plan trustees had stated that all investment decisions were based exclusively on broker's advice and broker had noticed at least one trustee that the trustees had to follow his advice or find a new consultant). In other words, there must be evidence that the



alleged fiduciary is effectively acting for the plan. *Associates in Adolescent Psychiatry v. Home Life Insurance Co.*, 941 F.2d 561, 570 (7th Cir. 1991).

Here, the evidence of Salomon's influence, taken in a light favorable to plaintiffs, fails to rise to the requisite level of control. Even assuming Salomon's alleged oral agreement to monitor the fee agreement is admissible,[4] nothing indicates that information from Salomon was or was intended to be the exclusive basis of NISA/APT's investment decisions. To the contrary, a review of plaintiff's evidence in this regard reveals that Salomon was to provide information not otherwise available to NISA but that NISA understood that there was a need for skepticism with respect to the information because as buyer and seller their interests were at odds. Indeed, those adverse interests are one of the reasons that NISA wanted Salomon to retain an equity interest in the investments — to increase the reliability of the information received by aligning Salomon's interests with that of APT. In a telling comment, Joseph Gorman, president of NISA, testified that "[i]n the last analysis, [NISA] had to independently assess whether [the Fee Agreements] ought to come into the portfolio. But in doing that we relied upon expertise that was other than our own; and that would be primarily Salomon, secondarily Ameritech." While it is clear that Salomon's advice was to be influential, it is also evident that neither APT or NISA had relinquished discretionary authority to Salomon.

Although, plaintiffs assert, Mr. Gorman also testified that Salomon was to "bring [NISA] whatever information or *decisions* we needed" (emphasis added), a review of the actual testimony reveals that Salomon was to follow the investment and report to NISA as required, thereby providing

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[4] Whether evidence of the oral agreement is admissible is addressed in the next section.

NISA/APT with useful information and apprising NISA/APT of decisions that NISA/APT needed to make.[5] As an example of the way in which the parties were to operate, Mr. Gorman stated, "if there was a choice to be made representing our part of the investment, that we be presented the choice and we would make the choice." Gorman Dep. at 350.

Despite plaintiffs' contention that Salomon's claimed expertise in the area of these real estate investments made Salomon's advice especially influential, influence over the trustees' investment decisions does not amount to effective control over plan assets. While persons who render advice to a plan may play influential roles by virtue of the expertise they possess or the capacities in which they act, to be a fiduciary such persons must exercise what amounts to actual decision-making power. *Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995); *Schloegel*, 994 F.2d at 271. Based on this record, it appears that Salomon's relationship to APT

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[5] More fully, Mr. Gorman stated,

> When we were clarifying roles and understandings about who would do what with respect to the MOA investment, [NISA] relied upon the fact that Salomon was [MOA's] investment banker, that [Salomon] had access to information that otherwise would not be available to us. And that as partners in the ownership of [the fee agreements], [Salomon] would follow it closely, appraise us of those things that affected our interest and bring to us whatever either information or decisions we needed to — most especially having to do with the closing, with the appraisal at the end where we would — where Ameritech would get out of their investment.

Gorman Dep. at 606-07. Even construing this testimony in a light favorable to plaintiffs, it is unreasonable to infer that Salomon was to be the decisionmaker.



was more akin to the relationship at issue in *Farm King* , where the broker periodically made presentations regarding the performance of prior investments and recommended courses of action with respect to both prior and future investments; the actual investment decisions, however, were left to the trustees. There is no evidence that Salomon, assuming it agreed to monitor the investments, did more. NISA remained free to reject any advice or information received from Salomon and there is no evidence that it ever purposefully or effectively surrendered that freedom. On this record, then, Salomon does not qualify as a plan fiduciary within the meaning of § 1002(21)(A)(i).

b. Rendering Investment Advice

Plaintiffs alternatively argue that Salomon is a fiduciary within the meaning of § 1002(21) because it was paid to provide investment advice regarding APT's money or property. *See* 29 U.S.C. § 1002(21)(A)(ii). To assist in deciding whether a person qualifies as an investment advisor fiduciary, the Department of Labor ("DOL") has promulgated regulations explaining that a person shall only be deemed to be rendering "investment advice" to an employee benefit plan if

> (i) such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) such person either directly or indirectly . . .
>
> (A) has discretionary authority or control, whether pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
>
> (B) renders any advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrange-

> ment or understanding, written or otherwise, between such person and the plan . . . that such services will serve as a primary basis for investment decisions . . . and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21(c)(1). The parties seem to agree that Salomon provided NISA/APT with information or recommendations that would satisfy subsection (i) of the DOL regulation. Their dispute centers on whether there is evidence satisfying the requirements of subsection (ii)(B).[6] Salomon contends that there is no admissible evidence of a mutual agreement or understanding that Salomon would provide advice that would serve as the primary basis for APT's investment decisions. Moreover, even if the there was a mutual understanding, Salomon contends that it received no fee or compensation for any alleged investment advice. Plaintiffs, of course, disagree.

The starting point for the analysis is whether there is adequate evidence to establish the existence of a mutual understanding between Salomon and NISA/APT to the effect that Salomon's advice would serve as the primary basis for NISA/APT's investment decisions. *Farm King*, 884 F.2d at

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[6] Plaintiffs also contend that Salomon qualifies as an investment advisor fiduciary under subsection (ii)(A), but as courts have recognized, subsection (ii)(A) of the DOL regulation is essentially an overlap of ERISA § 1002(21)(A)(i). *Olson v. E.F. Hutton & Co., Inc.*, 957 F.2d 622, 626 (8th Cir. 1992). As discussed above, there is no evidence that Salomon exercised discretionary control with respect APT's participation interests. Subsection (ii)(A) of the DOL regulations is not satisfied.



293. Again, plaintiffs rely on testimony and other evidence indicating that before the Assignments were executed, NISA sought and obtained Salomon's oral agreement to monitor the fee agreements and provide NISA/APT with the information necessary to make appropriate investment decisions. While insufficient to establish discretionary control over APT's assets, such pieces of evidence might raise a question of fact as to whether the requisite mutual understanding existed. Nevertheless, the court need not decide that issue because, as Salomon points out, the assignment of the participation interests was effected through an integrated written contract and, therefore, the parol evidence rule renders proof of the alleged oral agreement legally inadmissible.

Under New York law,[7] parol evidence is not admissible to vary or contradict the terms of a written agreement where the writing expresses the entire agreement of the parties, i.e., it is integrated. *Stroll v. Epstein*, 818 F. Supp. 640, 645 (S.D.N.Y. 1993). Here, each Assignment appears to be complete on its face and expressly provides that the written contract constitutes the entire agreement between the parties. *Id., citing, Happy Dack Trading Co., Ltd. v. Agro-Industries, Inc.*, 602 F. Supp. 986, 991 (S.D.N.Y. 1984) (a contract is integrated as a matter of law if it appears complete on its face). The Assignments are otherwise unambiguous and

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[7] Each Assignment transferring a percentage of Salomon's interests in the Fee Agreements provides that the Assignment will be governed by New York law. Because the parol evidence rule is substantive, not procedural, this court must look to the appropriate state law for guidance. As a federal court sitting in diversity, the court must apply the choice of law rules of the state in which it sits. Because Illinois will honor a contractual choice of law provision absent certain conditions not present here, the court must apply New York law in interpreting the Assignments. *Janice Doty Unlimited, Inc. v. Stoecker*, 697 F. Supp. 1016, 1019 (N.D. Ill. 1988).

make no reference to a separate agreement to monitor. While acknowledging the general contours of the parol evidence rule, plaintiffs argue that ERISA § 1110(a)[8] overrides the rule or preempts its application under circumstances like those presented here. They reason that relying on the Assignments' integration clause to preclude evidence of Salomon's fiduciary status is tantamount to using that provision to relieve Salomon of its fiduciary responsibilities. This argument is not persuasive. Assuming admissible evidence established that Salomon was an ERISA fiduciary, the integration clause would not relieve Salomon of any responsibility or liability attendant with that status. The parties merely agreed to limit their respective roles to that which is set forth in the Assignments. Whatever liability or responsibility follows from those roles remains unlimited. The Seventh Circuit has recognized the importance of this distinction. In a case where a contract vested one party with sufficient discretionary authority to be deemed an ERISA fiduciary, the court stated that despite ERISA § 1110(a) parties may contractually decide how much authority to vest in a person (potentially precluding a finding of fiduciary status), but they may not decide how much liability attaches to the exercise of that authority if the authority so bestowed makes that person a fiduciary. *Chicago Bd. of Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir. 1983). In short, § 1110(a) is inapplicable.

Plaintiffs also argue that proof of the monitoring agreement is admissible because it was a condition precedent to the assignment of Salomon's interests in the Fee Agreements.

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[8] This section provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).



New York law does permit the use of parol evidence to establish a condition precedent that precludes the legal effectiveness of the contract absent the occurrence of the condition, but only if the condition does not contradict the terms of the writing. *Hicks v. Bush*, 10 N.Y.2d 488, 180 N.E.2d 425, 427 (N.Y. 1962). Thus, despite plaintiffs' evidence that NISA would not have proceeded with the transaction absent the monitoring agreement, evidence of the alleged oral agreement is barred. It directly contradicts the terms of the Assignments which state that there are no other agreements between the parties other than those set forth therein. In other words, the language of the Assignment indicates that, unless otherwise set forth therein, the purchase and sale was unconditional. In a similar situation, an alleged oral condition to the effectiveness of a guaranty was found to be not proveable as a matter of law. *See Bank Leumi Trust Co. of New York v. Wulkan*, 735 F. Supp. 72, 77-78 (S.D.N.Y. 1990)(alleged oral agreement that effectiveness of guaranty was conditioned upon guarantor obtaining permission from proper governmental authorities). Plaintiffs' position may be better characterized as an intent to purchase Salomon's alleged agreement to monitor in addition to the participation interests. While NISA may not have intended to proceed with the transaction without this additional consideration, the alleged oral agreement is not a condition precedent in the sense that nonoccurrence of the condition precludes enforcement of the contract. The purchase and sale of the participation interests took place in accordance with the written Assignments; parol evidence cannot now be permitted to vary the terms of the sale.

Plaintiffs next argue that proof of Salomon's representations that it would monitor the fee agreement investments is admissible because a general merger clause is ineffective to exclude parol evidence to show fraud in the inducement of a contract. Although plaintiffs are correct that New York law does permit the introduction of parol evidence to prove alle-

gations of fraud, the introduction of the alleged agreement to monitor for this purpose would not materially advance plaintiffs' claim that Salomon is an investment advisor fiduciary. Proof that Salomon induced NISA to invest in worthless instruments by making fraudulent promises to monitor does not establish the mutual agreement that is essential to proving Salomon's status as an investment advisor fiduciary. To the contrary, it would suggest that there was no mutual agreement. While such evidence would be relevant to a claim that Solomon committed fraud, it is insufficient to establish the requisite contractual meeting of the minds. Plaintiffs have failed to offer admissible evidence of a mutual understanding between NISA and Salomon that Salomon would regularly provide investment advice which would serve as the primary basis of NISA/APT's investment decisions. In light of this conclusion, it is not necessary to consider whether Salomon received a fee or other compensation for any alleged investment advice.

In sum, plaintiffs have not offered sufficient evidence to create a genuine issue as to whether Salomon qualifies as an ERISA fiduciary. Salomon is entitled to summary judgment with respect to Count I of the Second Amended Complaint.

**Count II**

In this count, plaintiffs contend that regardless of whether Salomon qualifies as a fiduciary, they are entitled to restitution from Salomon because Salomon is a "party in interest" within the meaning of ERISA and, as a result, ERISA § 1106(a)[9] prohibits Salomon's participation in the Fee

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[9] The pertinent portions of § 1106(a) provide that

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(...continued)



Agreement transactions. 29 U.S.C. §§ 1106(a)(1)(A) and (D). They seek recovery pursuant to ERISA § 1132(a)(3)[10]. Salomon responds that the court should enter summary judgment in its favor, not plaintiffs, because ERISA does not authorize any private cause of action against nonfiduciaries, even parties in interest who have engaged in § 1106(a) prohibited transactions. Assuming, for purposes of argument, that statutory authority exists, Salomon further contends that Seventh Circuit precedent precludes all private avenues of recovery against nonfiduciaries for participation in prohibited transactions. Salomon finally asserts that plaintiffs have failed to satisfy their evidentiary burden with respect to essential elements of their claim.

a. Availability of a Private Remedy

Determining whether count II alleges a valid cause of action centers on two closely related but distinct issues:

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> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
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> * * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1)(A) & (D).

[10] This section provides that fiduciaries of a plan, like plaintiffs, may bring suit

> (A) to enjoin any act or practice which violates any provision of this subchapter [relating to the protection of employee benefit rights] or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3)(A) & (B).

whether it is a violation of ERISA for a nonfiduciary party in interest to engage in a § 1106(a) prohibited transaction and, if yes, whether ERISA affirmatively authorizes plaintiffs to bring suit to redress such a violation. Although the line between these issues is sometimes obscure, separate treatment provides a more reasoned understanding of ERISA's language and legislative history, as well as the relevant case law.

Turning to the first issue, Salomon relies on *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993), to assert that § 1106(a) does not explicitly impose any duty on *nonfiduciary* parties in interest to avoid participation in the indicated "prohibited" transactions, and, therefore, it has committed no wrong that is remediable under ERISA. In *Mertens*, the Supreme Court considered whether ERISA authorizes a cause of action against a nonfiduciary for knowing participation in the breach of another's fiduciary duties. The Court recognized that § 1132(a)(3), the same enforcement provision that is at issue here, does not authorize suit to obtain equitable relief "at large" but only for the purpose of "redress[ing] any violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. *Id.* at 253, 113 S. Ct. at 2067. Because no ERISA provision explicitly requires nonfiduciaries to avoid participation in an ERISA fiduciary's breach of its duties, the Court made clear its view, although in dicta, that such participation cannot be said to violate ERISA and, therefore § 1132(a)(3) would not authorize suit.[11] *Id.* Salomon would have the court apply identical rea-

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[11] The Court's discussion of this issue is dicta because the parties in *Mertens* assumed that the defendant's conduct violated ERISA. Therefore, the arguments before the Court and the Court's holding were limited to what forms of relief are available under § 1132(a)(3). *Mertens*, 508 U.S. at 254-55, 113 S. Ct. at 2067. Nevertheless, the Seventh Circuit has found the *Mertens* dicta to be controlling within this circuit. *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994)("the Supreme Court has made (...continued)



soning to find that Salomon had no duty to avoid participation in the Fee Agreements. The Court in *Mertens*, however, specifically contrasted the absence of any provision giving rise to a nonfiduciary's duty to avoid "knowing participation," with other provisions which, it recognized, can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in § 1106(a) transactions. *Mertens*, 508 U.S. at 254 & n.4, 113 S. Ct. at 2067 & n.4 ("ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries . . . ." "For example, a 'party in interest' . . . may not offer his services or engage in certain other transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2)."). Salomon's attempt to counteract the importance of the Supreme Court's distinction between the lack of duty in the case before it and the presence of a duty regarding § 1106(a) is without force. Indeed, Salomon seems to accept *Mertens*' belief that § 1106(a) can be read as imposing obligations on nonfiduciary parties in interest, but argues that the existence of a duty is not enough to authorize a civil action against it. *See e.g.*, Salomon's Memorandum Addressing Cases Supplementally submitted by Plaintiffs on the Parties' Cross Motions for Summary Judgment at 6. This argument is more applicable to the second half of the analysis and will be discussed below. Further, several appellate courts have acknowledged the significance of this distinction and have concluded that parties in interest are obligated to avoid the transactions prohibited in § 1106(a). *See e.g., Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

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clear its view that Congress's omission to impose on nonfiduciaries a duty not to participate knowingly in an ERISA fiduciary's breach of fiduciary obligations was not inadvertent").

In addition to the Supreme Court's acknowledgment, ERISA's legislative history reflects a congressional intent to obligate nonfiduciary parties in interest to abstain from participation in § 1106(a) transactions. A Joint Explanatory Statement of the Committee of Conference ("Conference Report"), reveals that, "[t]he conference substitute[12] prohibits plan fiduciaries *and parties in interest* from engaging in a number of specific transactions." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 5087 (emphasis added). The Conference Report further indicates that "blind" purchases or sales, *e.g.*, where neither party knows the identity of the other, will not ordinarily be prohibited transactions, because "there is no reason to impose a sanction on a fiduciary (*or party-in-interest*) merely because, by chance, the other party turns out to be a party-in-interest (or plan)." *Id.* (emphasis added). Thus, the legislative history recognizes, at least implicitly, that both parties may be subject to sanctions when the parties in a prohibited transaction are known to each other. Contrary to Salomon's contention, then, the legislative history reveals that Congress perceived certain transactions between a plan and a party in interest as problematic, and in enacting § 1106(a) it intended to impose a duty on both parties in interest and fiduciaries to avoid such transactions. *Accord, Comm'r. of Internal Revenue v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, 113 S. Ct. 2006, 2012 (1993)("Congress' goal [in § 1106(a)] was to bar

[12] In enacting ERISA, the House of Representatives proposed a bill which the Senate rejected. The Senate then proposed its own legislation in the form of amendments to the House bill. Because of significant differences between the House and Senate proposals, the bills were sent to a committee of conference which agreed to a "conference substitute." The conference substitute was approved by both houses and enacted into law.



categorically a transaction that was likely to injure the pension plan.").[13]

Nevertheless, Salomon argues, the Seventh Circuit's adoption of the *Mertens* dicta in *Continental Casualty* is controlling within this circuit. In *Continental Casualty*, the Seventh Circuit determined that it was bound to follow *Mertens*' view that ERISA failed to impose any duty on nonfiduciaries to avoid knowing participation in an ERISA fiduciary's breach of its duties. 33 F.3d at 757. Although the Seventh Circuit found that dicta to be sufficiently weighty to control the outcome of the very issue that the dicta addressed, it did so only with some degree of discomfort. *Id.* at 757 (indicating that the Supreme Court's discussion was based on "a strict constructionist's approach that we might not embrace as an original matter"). In light of this obvious unease, it is not at all clear that the Seventh Circuit would find a similar lack of duty under the circumstances of this case, especially where *Mertens* itself, subsequent appellate court cases and ERISA's legislative history all indicate that different treatment is appropriate. Parties in interest, even if not fiduciaries of a plan, have a duty under § 1106(a) to avoid the transactions identified therein.

The question then becomes whether ERISA authorizes a private cause of action to recover against nonfiduciary parties in interest who violate § 1106(a). Salomon contends that ERISA not only fails to expressly create a private right of action but that the legislative history demonstrates that Congress rejected any such right. In contrast, the circuit courts that have addressed the issue have uniformly found

[13] Indeed, if there were no duty to avoid such transactions, one might wonder whether there is any basis for imposing administrative penalties against parties in interest, a remedy which Salomon concedes is authorized. *See* 29 U.S.C. § 1132(i).

that ERISA's civil enforcement provision, 29 U.S.C. § 1132, provides the requisite authority. *See e.g., Stangl*, 73 F.3d at 1032; *Landwehr*, 72 F.3d at 734; *Compton*, 57 F.3d at 285-87; *Rowe*, 20 F.3d at 31. Despite factual differences between those cases and this one, their reasoning is persuasive.

The language of § 1132(a)(3) is plainly broad enough to constitute the needed "affirmative authorization." Under its terms, plaintiffs are entitled to bring an equitable action to redress any violation of ERISA or to enforce the terms of the statute. Because a party in interest's participation in a § 1106(a) prohibited transaction violates the statute, plaintiffs' suit can be said to be intended to redress the alleged violation and to enforce ERISA's ban on those transactions. That § 1132(a)(3) does not identify specific categories of potential defendants makes it clear that it was intended to authorize suit against any entity that violates ERISA. Thus, whether Salomon is a proper defendant does not turn on whether it is a fiduciary or nonfiduciary but on whether it violated ERISA, that is to say, whether it is in fact a party in interest who engaged in a prohibited transaction.

This conclusion is in accord with *Mertens* where the Court made clear its belief that § 1132(a)(5)[14] did not authorize suit because the nonfiduciary defendant had not violated ERISA, not because the section failed to expressly authorize suits against nonfiduciaries. Moreover, the Court strongly suggested that private suits could be used as an avenue of recovery against nonfiduciary parties in interest who engage in

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[14] Although the Court in *Mertens* was directly confronted with an action by the Secretary of Labor pursuant to § 1132(a)(5) (authorizing the Secretary of Labor to file suit on the same basis that a plan fiduciary, beneficiary or participant file suit under § 1132(a)(3)), the Court stated that the language of § 1132(a)(3) should be deemed to have the same meaning as § 1132(a)(5). *Mertens*, 508 U.S. at 260, 113 S. Ct. at 2070.



prohibited transactions. It stated, "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . ." Salomon counters that the Court must have been referring to the administrative "correction" of a prohibited transaction.[15] *See* 29 U.S.C. § 1132(i). Such an assumption, however, makes little sense in light of the mandatory nature of the Court's language. Although § 1132(i) authorizes the Secretary of Labor to levy a greater penalty against a party in interest if a prohibited transaction is not corrected, nothing in that section says that a party in interest must correct the transaction. Thus, despite the threat of a fine up to 100% of the amount at issue, a party in interest is nonetheless free to keep any ill-gotten plan assets.[16] The more reasonable interpretation of *Mertens* is that the Court

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[15] Section 1132(i) provides that

> In the case of a transaction prohibited by section 1106 . . . by a party in interest . . ., the Secretary [of Labor] may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved . . .; except that if the transaction is not corrected . . . such penalty may be in an amount not more than 100 percent of the amount involved.

29 U.S.C. § 1132(i). "Correction is accomplished by undoing the prohibited transaction to the extent possible. *See* 29 C.F.R. § 2560.502i-1(c), *incorporating*, 26 C.F.R. § 53.4941(e)-1(c)(1).

[16] Under some circumstances, refusal to correct a prohibited transaction may be the more attractive option. Even where a party in interest corrects the transaction, the Secretary of Labor may still impose a civil penalty of up to 5 % of the amount at issue. 29 U.S.C. § 1132(i).

was referring to an ability to use civil actions under § 1132(a) to force a party in interest to disgorge.[17]

Salomon insists, however, that Congress's specific imposition of administrative penalties and excise taxes on parties in interest is proof that all other remedies should be excluded. This argument is at odds with both the language of § 1132(a)(3) and ERISA's statutory purposes. ERISA is intended to provide protection for the interests of participants in employee benefit plans. 29 U.S.C. § 1001. Moreover, the Supreme Court has recently recognized that § 1132(a)(3) is a catch-all provision that operates as a safety net when the specific remedies set forth under ERISA are inadequate. *Varity Corp. v. Howe*, __ U.S. __, 116 S. Ct. 1065, 1077-78 (1996). To find that administrative penalties and excise taxes are the exclusive remedies against parties in interest who have engaged in prohibited transactions would provide little, if any, protection for the interests of the plan participants. For example, where the fiduciary who caused the plan to enter the transaction is judgment proof, there might be no means to recover the plan's lost assets. As the Ninth Circuit recognized in Landwehr, limiting the potential defendants to only one of two parties to the transaction, far from providing the full range of remedies available, would render the available

[17] The Court's subsequent statement indicating that service providers "(assuming nonfiduciaries can be sued under [§ 1132](a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees," is best understood as specifically referring to suits against nonfiduciary service providers for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. *See Mertens*, 508 U.S. at 262, 113 S. Ct. at 2072. As already discussed, the Court believed that such participation was not an ERISA violation, but assuming it was, it makes clear that § 1132(a)(3) would authorize an action for injunctive relief, restitution or other equitable remedies.



relief wholly inadequate. Landwehr, 72 F.3d at 734, *citing, Nieto v. Ecker*, 845 F.2d 868, 874 (9th Cir. 1988).

Salomon argues, however, that ERISA's legislative history undeniably shows that Congress expressly rejected any private cause of action against nonfiduciary parties in interest, and therefore the general language of § 1132(a)(3) should not be used to bring in such an action "through the back door." The court does not agree. Each of the rejected provisions would have imposed personal liability on parties in interest, subjecting them to claims for legal relief, *e.g.*, damages. The rejection of those provisions, however, does not necessarily rule out the potential for a compromise somewhere between no civil liability and personal liability for all losses, *e.g.*, the availability of a suit limited to equitable relief. Indeed, the final language of § 1132(a), with its inclusion of catch-all provisions for equitable relief, appears to be just such a negotiated compromise.[18]

But, Salomon argues, the Conference Report also states that ERISA's "labor provisions," of which § 1132 is a part, apply rules and remedies similar to trust law governing the conduct of *fiduciaries*, while the "tax provisions" (§§ 1201 *et seq.*) apply to "disqualified persons," i.e., parties in interest, who violate the new prohibited transaction rules. *See* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted*

[18] The original House bill would have made only fiduciaries personally liable for losses resulting from a violation of the prohibited transaction rules but even then only if there was no adequate consideration for the transaction. The Senate version, by contrast, would have extended legal relief to both fiduciaries and parties in interest, even if there was adequate consideration. The conference substitute appears to reach a compromise between these extremes in a number of ways, including the inclusion of § 1132(a)(3) and (5) which, while otherwise limiting the availability of legal relief to defendant fiduciaries, permit recovery of only equitable relief from nonfiduciaries who violate the Act.

in, 1974 U.S.C.C.A.N. at 5076. The intent that Salomon attributes to this statement (that the remedies provided in § 1132(a) should be limited to fiduciaries, while the tax provisions apply to parties in interest) is based on an overly narrow reading of the statute and the legislative history. Although Congress incorporated principles of traditional trust law into the labor provisions, it does not mean that Congress did not intend to extend the use of those principles beyond parties who would have constituted fiduciaries at common law. To the contrary, the Conference Report specifically states that the labor provisions affect "parties-in-interest," distinguishing this broader range of people from the "disqualified persons" affected by the tax provisions. *Id.* at 5087. Moreover, ERISA, in part, is a direct reflection of Congress' determination that trust law does not offer adequate protection to employee benefit plans. *See Varity Corp.*, __ U.S. __, 116 S. Ct. at 1070.

Salomon finally argues that regardless of the statutory analysis, the Seventh Circuit has unquestioningly foreclosed private claims against a nonfiduciary for ERISA violations, including participation in § 1106(a) prohibited transactions. This conclusion is built on a multi-tiered argument. First, Salomon correctly points out that any relief sought under § 1132(a)(3) must be equitable in nature. Second, Salomon contends, the Seventh Circuit, in *Continental Casualty*, held that restitution sought from a nonfiduciary is only equitable when the claim for recovery is based on a theory of aiding and abetting, i.e., knowing participation in, a breach of fiduciary duties. But, *Continental Casualty*, embracing *Mertens*' dicta, has held that a nonfiduciary cannot be held liable under § 1132(a)(3) for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. Thus, Salomon concludes, a claim for restitution against a nonfiduciary necessarily falls into one of two categories: either it constitutes a claim for legal relief and is barred by *Mertens*, or it is based on an aiding and abetting/knowing participation theory and is



barred by *Continental Casualty's* adoption of the *Mertens* dicta.

The court is not persuaded by this argument. In *Continental Casualty*, the Seventh Circuit merely expressed a belief, though ultimately unnecessary to its decision, that restitution is not an exclusively equitable remedy. *Continental Casualty*, 33 F.3d at 756. It explained that whether restitution is an equitable remedy turns on whether the duty giving rise to the claim is founded on legal or equitable principles. The court concluded that the claim before it (nonfiduciary's knowing participation in a breach of fiduciary duty) was founded on equitable principles. Contrary to Salomon's contention, however, it did not hold, or even suggest, that such a claim was the only one where a request for restitution from a nonfiduciary could be based on equitable precepts. Indeed, such a limitation would be inappropriate in light of traditional trust law which provides rules permitting equitable actions to regain improperly transferred trust property for reasons other than the recipient's knowing participation in the trustee's breach of its fiduciary duties. *See e.g.*, 4 A. Scott & W. Fratcher, *The Law of Trusts*, §§ 288-94 (4th ed. 1989); Restatement (Second) of Trusts, §§ 280-295 (1959)(both discussing recovery from gratuitous donees and from recipients of trust property via illegal transactions). Salomon is not entitled to summary judgment on this basis.

b. Failure of Proof

Salomon next argues that it is entitled to summary judgment because under *Continental Casualty*, plaintiffs must prove that Salomon knowingly participated in NISA's knowing breach of its fiduciary duties. In other words, there must be evidence that NISA, as APT's fiduciary, caused APT to enter into the Fee Agreements with knowledge that they were prohibited transactions and that Salomon participated in the transactions knowing they were prohibited and that NISA was breaching its fiduciary duty.

Here, plaintiff has provided proof that NISA was a fiduciary of the plan and that it caused APT to enter into the participation interest transactions. Moreover, there is sufficient evidence in the record relating to Salomon's earlier provision of services to NISA/APT to suggest that NISA knew or should have known that Salomon was a "person providing services to [APT]."[19] Nothing in the statute suggests that NISA had to have actual knowledge that the transaction was in fact illegal or that NISA qualified, legally, as a party in interest. Thus, the record is sufficient to raise a question of fact as to whether NISA knew or should have known that the transaction was a sale or exchange of property between the plan and a party in interest or for the benefit of a party in interest.

Moreover, as discussed above, Salomon's liability is premised on a direct violation of ERISA, and not, as Salomon argues, on secondary liability for knowing participation in NISA's breach. While Congress has made clear that § 1106 does not create a strict liability cause of action in the sense that even a blind transaction would constitute a prohibited transaction, *see* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. at 5087, actual knowledge that the transaction was in fact prohibited does not appear necessary. Rather, knowledge that it was a service provider to an employee pension benefit plan and was engaging in a transfer of property with the plan or its fiduciary is enough. Plaintiffs' evidentiary submissions are sufficient to satisfy this standard. Salomon is not entitled to summary judgment with respect plaintiffs' claims that Salomon has violated § 1106(a)(1)(A) and (D).

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[19] ERISA broadly defines the term "party in interest" to include, among other things, "a person providing services to [a] plan." 29 U.S.C. § 1002(14)(B).



c. Availability of Restitution as a Remedy

Alternatively, and without much elaboration, Salomon argues that plaintiffs are barred from obtaining restitution because they affirmed the purchase of the Fee Agreement participation interests when they opted to sell APT's claims that were filed in MOA's bankruptcy proceeding. Plaintiffs respond that, as fiduciaries of APT, they were merely satisfying their duty to mitigate damages and to rid APT of an imprudent investment.

As a general rule, if a person continues to perform a contract after discovering facts which make it voidable (e.g., fraud), it is inferred that he has affirmed the contract and he is no longer entitled to avoid it and obtain restitution. *See* Restatement of Restitution § 68 (1937). Plaintiffs' sale of APT's claim in MOA's bankruptcy proceeding, however, is more akin to an attempt to preserve what APT had already invested than it is to continued performance. Such acts of preservation do not extinguish the right to restitution. *Id.* § 68 comment b. Moreover, the rule regarding affirmance of the contract appears, at least in part, to arise out of the requirement that the person seeking restitution tender back or at least offer to tender back the subject matter of the contract. *Soderberg v. Gens*, 652 F. Supp. 560, 565 (N.D. Ill. 1987). In this way, any potential unjust enrichment of the rescinding party is avoided. *See* Restatement of Restitution § 65. Acts of affirmance would necessarily be in conflict with the ability to tender. Here, however, plaintiffs claim that Salomon's misrepresentations caused NISA to purchase participation interests that were in fact worthless. As a result, no offer to restore the participation interests to Salomon is required. *Id.* § 65 comment e.

The court concludes, in light of the above principles, that the sale of APT's bankruptcy claims does not prevent this action for restitution.

d. Plaintiffs' Cross Motion

The conclusion that Salomon is not entitled to summary judgment, however, does not necessarily entitle plaintiffs to a favorable ruling with respect to their cross motion on count II. Salomon argues that plaintiffs' motion should be denied because there is a genuine issue of material fact regarding the applicability of Prohibited Transaction Exemption 75-1 ("PTE 75-1") in which the DOL and the Internal Revenue Service established a safe harbor for certain "customary securities transactions." PTE 75-1 provides that the prohibitions of § 1106 will not apply to "any purchase or sale of a security between an employee benefit plan and a broker-dealer . . . if [the enumerated] conditions are met." 40 Fed. Reg. at 50847. Plaintiffs respond that Salomon is not entitled to the protections of PTE 75-1 because the participation interests sold to APT are not "securities" and, even if they were, there is no evidence that the conditions specified in PTE 75-1 are satisfied.

The parties agree that the definition of a "security" in the federal securities laws controls whether the participation interests in the Fee Agreements constitute securities within the meaning of PTE 75-1. *See* 15 U.S.C. §§ 77b(1) and 78c(10). These statutes provide that a "security" is "any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement, . . . investment contract, . . . or in general, any instrument commonly known as a security . . . . *Id.* § 78c(10).[20] In addition to ordinary stock and bonds, it is intended to encompass "countless and

[20] The definition of "security" set forth in 15 U.S.C. § 77b(1) is virtually the same and, in practice, the two definitions are considered interchangeable. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 411 n.5 (7th Cir. 1988), *citing, Tcherepnin v. Knight*, 389 U.S. 332, 335-36, 88 S. Ct. 548, 553 (1967).



variable schemes devised by those who seek the use of the money of others on the promise of profits . . . ." *SEC v. W.J. Howey, Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 1103 (1946). It extends to many uncommon and irregular instruments, not just instruments traded at securities exchanges. *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S. Ct. 1220, 1223 (1982). Nevertheless, the statute's broad sweep is tempered by the fact that "Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world. . . ." *Id.* Moreover, instruments technically falling within the statutory description will not be considered a security if the context requires otherwise. 15 U.S.C. §§ 77b(1) and 78c(10); *Marine Bank*, 455 U.S. at 558, 102 S. Ct. at 1225.

As an initial matter, Salomon has moved to strike the affidavits of two law professors submitted in support of plaintiffs' motion. In the affidavits, the professors, both experts in securities law, set forth their opinions that the four Fee Agreements are not securities and that the sale of the participation interests (via the Assignments) do not constitute the sale of securities. While expert legal testimony may be appropriate in some circumstances, the court concludes that the affidavits of professors Coffee and Seligman go beyond that which proper. Rather than express their opinions regarding significant factual characteristics of securities in general, Professors Coffee and Seligman have started with certain assumptions about the legal definition of a security (presumably provided to them by plaintiffs' counsel) and then proceeded to evaluate the specific evidence in this case to determine what the "facts" are. In short, while the affidavits carry the added imprimatur of securities experts, they offer nothing more than legal argument typically supplied by a party's legal representative. On a motion for summary judgment, it is the duty of the court to construe the law, interpret the evidence in the appropriate manner and to determine whether there is any genuine issue of material fact

which necessitates a trial. Because the affidavits of plaintiffs' legal experts usurp this judicial function, they will be stricken.[21]

Salomon asserts that there is a genuine issue of fact as to whether the sale of the participation interests to APT constituted the sale of securities because the participation interests qualify as any one of four separate instruments contained in the statutory definition of security. More specifically, Salomon asserts that the participation interests qualify as "evidence of indebtedness," "participations in a profit sharing agreement," "investment contracts," or "other instruments commonly known as securities."

In *Howey*, 328 U.S. at 299, 66 S. Ct. at 1103, the Supreme Court established the test for determining whether a particular transaction constitutes an "investment contract" security. The salient characteristics of such a security are a transaction whereby a "person invests his money in a common enterprise and is led to expect profits solely from the effort of the promoter or a third party." *Id.* While this test does not apply to all the types of instruments set forth in the statutory definition, the Supreme Court later recognized that it is equally applicable to the general category of "instrument commonly known as a security." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 n.5, 105 S. Ct. 2297, 2304-05 n.5 (1985). Further, the Seventh Circuit has held that the same requirements apply to the category of "participations in a profit sharing agreement." *Secon Service System, Inc. v. St.*

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[21] Anticipating the worst, Salomon submitted a counteraffidavit from a third law professor who opined that both the Fee Agreements and the Assignments constitute securities. Salomon states that this counteraffidavit is only to be considered in the event that the affidavits of plaintiffs' legal experts are not stricken. In light of the above ruling, the court has not considered this counteraffidavit.



*Joseph Bank & Trust Co.*, 855 F.2d 406, 411 (7th Cir. 1988), *citing, Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 102 (7th Cir. 1977). Thus, these three categories may be considered together.[22]

To avoid summary judgment under the *Howey* test, there must be some evidence that there has been an 1) investment of money, 2) in a "common enterprise," 3) with an expectation of profits, 4) derived primarily from the efforts of a third party. Plaintiffs assert that Salomon cannot establish that the second element because APT was the only investor in the participation interests. Although there is a split among the circuits, the Seventh Circuit has consistently adhered to the belief that "horizontal commonality" is a necessary requirement to establish the common enterprise element of the *Howey* test.[23] *See e.g., SEC v. Lauer*, 52 F.3d 667 (7th Cir. 1995); *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016 (7th Cir. 1994); *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972). This means that the transaction must involve not only a pooling of interests between a devel-

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[22] Salomon relies on *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945 (1990), to argue that the *Howey* test does not apply when an instrument falls within any category of the statutory definition (other than investment contract), rather the instrument is presumed to be a security unless the context indicates otherwise. This argument is not persuasive. In *Reves*, the court reconfirmed its earlier statement in *Landreth* to the effect that the *Howey* test cannot be said to apply to every type of instrument listed in the statute. It then went on to establish its own test for "notes." Nothing in *Reves*, however, suggested that the Court believed the *Howey* test was inappropriate for participation interests or other instruments commonly known as securities.

[23] As pointed out in *Wals*, the Fifth, Eighth and Tenth circuits appear to require only "vertical commonality," which is present when the interests of the promoter and an individual investor are connected. *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016, 1017 (7th Cir. 1994).

oper/promoter and an investor, but also among several investors. In other words, investors must have pooled their resources to obtain an undivided interest in a common asset from which they expect to obtain a profit based primarily on the efforts of others. Based on the record before this court, however, APT was the only actual investor in the participation interests.

Salomon argues that APT was not the only investor because Salomon retained an undivided 5% interest in three of the four Fee Agreements and, like APT, expected to receive it share of MOA/Best Inns' profits associated with that interest. Additionally, Salomon points out, MOA/Best Inns only agreed to pay Salomon a portion of the profits from the motel operations and, therefore, MOA/Best Inns also had an undivided, shared expectation of profit. This argument is unpersuasive. The clear implication of this circuit's interpretation of the *Howey* test is that several investors must pool their resources with the expectation that another's use of that money will produce a profit or return on their investment. Under the record in this case, Salomon cannot be characterized as such a passive investor who has jointly pooled its funds with APT. Each of the Fee Agreements expressly provide that any payments to be made are consideration for Salomon's work in placing the mortgage notes issued by MOA/Best Inns. This suggests that money Salomon expected to receive was compensation for services performed, not a return or profit on an investment. Although Salomon presents evidence that the impetus behind the Fee Agreements was Salomon's decision to place its own money at risk by serving as a principal and purchasing the underlying mortgage notes (rather than simply acting as a placing agent), this evidence does not alter the essential character of the payments to Salomon under the Fee Agreements. Salomon's "investment" was in the mortgage notes, the Fee Agreements were compensation for its services. Similarly, Salomon's rather novel argument that MOA/Best Inns' retention of a certain percentage of its profits makes MOA and Best Inns co-investors for purposes of establishing horizontal commonality is not convincing. Clearly, profit to the companies would result from their operation and management of the motel properties, not from a passive investment of money therein.



Even if APT were the only investor in the participation interests, Salomon further argues that *Lauer*, the Seventh Circuit's most recent "common enterprise" case, essentially eliminated the requirement of actual horizontal commonality. In *Lauer*, the defendant promoter of a fraudulent investment program attempted to avoid application of the securities laws by arguing that he only persuaded one person to actually invest in the scheme. The court concluded that it was appropriate to judge the promoter's offering as what he represented it to be. In other words, where part of the alleged fraud is that the instrument for sale is a security when it is nothing of the kind, the defrauding promoter is estopped to deny the existence of a security. In reaching it conclusion, the court reasoned that "it is the character of the investment vehicle, not the presence of multiple investors, that determines whether there is an investment contract." *Lauer*, 52 F.3d at 670. Although the context in which *Lauer* was decided is distinct from the present case, the reasoning of the court suggests that horizontal commonality cannot be determined solely from the *actual* presence of multiple investors. Rather, the court must assess the intended character of the instrument. In this way, the existence of security status is protected against the fortuity that only one person in fact chooses to invest.

Here, Salomon has offered evidence that an offering memorandum was prepared with respect to the sale of the participation interests in the first three Fee Agreements and that such a memorandum was drafted but never completed with respect to Fee Agreement IV. The record also reveals that NISA/APT received the offering memoranda. All of these memoranda referred to multiple investors. Further,

Salomon personnel have testified that other potential investors were contacted with respect to participating in Fee Agreement I and that Salomon was prepared to seek out other investors if APT did not buy the participations in Fee Agreements I-IV. These pieces of evidence, while not particularly persuasive, are sufficient at this juncture to raise a question of fact regarding the intended character of the participation interests. Thus, on this record, there remains a genuine issue as to whether the participation interests are securities within the meaning of PTE 75-1.

But, plaintiffs argue, even if the participation interests might be a security, summary judgment is appropriate because PTE 75-1 only exempts securities sold under certain conditions and there is no evidence that one of those conditions is satisfied.[24] More specifically, they assert that Salomon has not offered any evidence that the transactions were as favorable to APT as an arms-length transaction with an unrelated third party would have been. A review of the record, however, reveals that Salomon has provided at least some proof indicating that an unrelated party might have paid a similar price for the participation interests. For example, for unrelated purposes, Salomon itself valued the Fee Agreements at approximately the value which the parties eventually ascribed to them. While such evidence may not ultimately be sufficient to carry the day, when taken in a light favorable to Salomon, it is enough to avoid summary judgment. Whether the transaction was as favorable to APT as an arms-length transaction would have been necessarily involves a highly factual determination of the fair market value of the participation interests. The court is not prepared to

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[24] Plaintiffs' argument that PTE 75-1 is inapplicable because the Fee Agreements were not "customary" securities and were not subject to close regulation lacks force. Those factors are not required to qualify for the exemption. *See* 40 Fed. Reg. at 50847.



conclude that there is no genuine issue of fact in that regard. Because there remains a triable issue of fact with respect to the applicability of PTE 75-1, plaintiffs also are not entitled to summary judgment with respect to count II.

**Count III**

Count III alleges that Salomon knowingly participated in NISA's breach of its fiduciary duties to APT by selling the interests in the fee agreements to NISA for APT's benefit. In other words, plaintiffs contend that Salomon is secondarily liable for its knowing participation in NISA's involvement in a § 1106 prohibited transaction. Salomon argues that it is entitled to summary judgment because *Mertens* and *Continental Casualty* make clear that ERISA does not provide a cause of action against nonfiduciaries for knowing participation in another person's fiduciary breaches. Plaintiffs respond that *Mertens* and *Continental Casualty* are not controlling in light of Salomon's status as a party in interest.

Plaintiffs' attempt to avoid the rule of *Continental Casualty* is without force. As discussed above, the Seventh Circuit, relying on the *Mertens* dicta, specifically held that nonfiduciaries cannot be found liable for knowing participation in another person's fiduciary breaches. This rule is equally applicable to nonfiduciaries who also happen to be parties in interest. While this may appear to be at odds with the above discussion regarding count II, it is not. The confusion stems from the fact that the alleged fiduciary breach happens to be NISA's participation in a § 1106 prohibited transaction. As discussed above, nonfiduciary parties in interest may be held liable under § 1132 for their own involvement in a prohibited transaction because § 1106 can be read to affirmatively impose an obligation of parties in interest to avoid such transactions. Their status as a party in interest, however, does not subject such persons to derivative liability for another's violation of ERISA. Thus, to the extent that Salomon participated in a prohibited transaction, it

may be found directly liable under count II. Salomon cannot otherwise be held accountable to plaintiffs for damages as alleged in count III. For these reasons, Salomon is entitled to summary judgment with respect to count III.

**Statute of Limitations**

Salomon further argues that, at the very least, the running of the statute of limitations entitles it to summary judgment with respect any cognizable ERISA claim arising out of the sale of the participation interests in Fee Agreements I and II. A plaintiff must bring claims for ERISA violations within six years after the date of the last action which constituted the violation or three years after the plaintiff had actual knowledge of the alleged violation, whichever is earlier. 29 U.S.C. § 1113. Because APT knew the parties to the transactions and their relationship to the plan at the time NISA purchased the participation interests in Fee Agreements I and II (on October 28, 1987 and April 28, 1988, respectively), Salomon submits that plaintiffs had actual knowledge of the alleged § 1106 violation at the time of the closings. Despite this knowledge, plaintiffs did not commence this action until March 27, 1992. Plaintiffs respond that Ameritech's employees and NISA did not understand that any of the participation interests violated ERISA until sometime in 1990 and that Salomon repeatedly misled NISA and APT regarding the viability of the MOA/Best Inns portfolios.

Actual knowledge under 29 U.S.C. § 1113 only requires knowledge of the essential facts of the illegal transaction, not its illegality. *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). Nevertheless, mere notice that something is awry is not enough, the plaintiff must have specific knowledge of the facts that would establish the breach of duty upon which he sues. *Radiology Center, S. C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir. 1990). Yet, as Salomon has so carefully pointed out, here there are factual questions whether the sales of the



participation interests fall within the safe harbor provisions of PTE 75-1. Assuming that the participation interests do not constitute securities, as plaintiffs argue, then knowledge of the essential facts would seem to require no more than knowing the parties to the transaction and their relationship to APT. Plaintiffs do not argue that they were unaware of those facts at the time of the closings on Fee Agreements I and II. On the other hand, if it is determined that the participation interests are securities, then the essential facts of which plaintiffs would need specific knowledge would include information that the transaction was not as favorable to APT as an arms-length transaction with an unrelated third party would have been. Plaintiffs' evidence that Salomon misled NISA and APT regarding the viability of the MOA/Best Inns portfolios until sometime in 1990 creates a question of fact as to when plaintiffs gained that knowledge which was essential to their claim. Any ruling on the statute of limitations issue is, therefore, premature.

**Salomon's Counterclaims for Contribution**

In its counterclaims, Salomon alleges that if it is liable to APT for any breach of duty (count I) or for any transactions which violated ERISA § 1106 (count II), then it is entitled to contribution from Ameritech because Ameritech similarly must have breached its duties to APT. Plaintiffs assert that there is no right of contribution under ERISA, but even if there is, Ameritech is entitled to summary judgment in its favor because the undisputed evidence establishes that NISA controlled the decision to invest in the Fee Agreements and to the extent that the available relief is equitable, contribution is inappropriate.

In a well reasoned ruling on plaintiffs' earlier motion to dismiss Salomon's counterclaims, Judge Aspen rejected plaintiffs' argument that there is no right to contribution under ERISA. The court is not inclined to revisit this issue. Plaintiffs have failed to identify any specific changes in the

law that would affect that ruling. Moreover, regardless of whether there may be some right to contribution under ERISA, Salomon has no such right here. In light of the above rulings, the only remaining ERISA cause of action is Salomon's alleged violation of § 1106 based on its status as a party in interest and its participation in prohibited transactions. As a result, the recovery plaintiffs seek is limited to "appropriate equitable relief" such as restitution of the amount by which Salomon has been unjustly enriched. Unlike the damages that may have been available if Salomon had been a fiduciary of APT, "liability for [its] own ill-gotten gains cannot be shifted, even to one more culpable." *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 33 (D. Mass. 1990). This distinction makes sense. While a plaintiff's damages may result from the actions of more than one defendant, when recovery is based on the amount by which the defendant is unjustly enriched, there is no similar responsibility to be apportioned. The defendant unfairly received whatever it received. Thus, even if Ameritech breached a fiduciary duty vis a vis APT and may itself be liable in damages for its own breach of care, Salomon cannot shift the burden of paying whatever amount it may have unfairly received as a result of its alleged violation of ERISA § 1106.[25] Plaintiffs are entitled to summary judgment with respect to Salomon's counterclaims for contribution.

**ORDER**

For the foregoing reasons, it is hereby ordered as follows:

1. Defendants' Motion to Strike Affidavits of Plaintiffs' Proposed Law Professor "Experts" is granted.

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[25] This conclusion makes it unnecessary to consider plaintiffs' evidentiary argument that only NISA made the decision to invest in the Fee Agreements.



2. Defendants' Motion to Strike Certain Evidence relied upon in plaintiffs' July 11, 1995 12N Response is denied as moot in light of the other rulings contained herein.

3. Defendants' Motion for Summary Judgment on Plaintiffs' Federal Claims is granted as to counts I and III of the Second Amended Complaint and as to any claims contained in count II which are premised on an alleged breach of fiduciary duty. It is denied in all other respects.

4. Plaintiffs' Motion for Partial Summary Judgment is denied with respect to count II of the Second Amended Complaint and granted with respect to defendants' counterclaims for contribution.

5. The parties are directed to engage in good faith settlement discussions in an attempt to mutually resolve all remaining claims and if, despite the parties' sincere efforts, a settlement is not reached, the parties are further directed to agree on a briefing schedule for Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims. This matter is set for status on July 15, 1996 at 2:00 p.m.

s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: June 13, 1996

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, | ) | |
| Plaintiffs, | ) | CIVIL ACTION |
| vs. | ) | No. 92 C 5883 |
| SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., | ) | Magistrate Judge Lefkow |
| Defendants. | ) | DOCKETED SEP. 10, 1996 |

**[PROPOSED] ORDER MODIFYING THIS COURT'S DECISION TO CONFIRM THAT STATEMENTS OF THE FACTS IN THE DECISION CONSTITUTE A STATEMENT OF THE NON-MOVING PARTY'S EVIDENCE**

It is hereby ordered that this Court's Memorandum Decision and Order, dated June 13, 1996 and filed June 18, 1996, is modified by the addition of the following paragraph to the bottom of page 3 of the Memorandum Decision

> Unless otherwise expressly stated, statements of the facts in the section of the Decision entitled "Factual Background" or elsewhere in the Decision constitute statements of the non-moving party's evidence or reasonable inferences therefrom viewing the evidence in the non-moving party's favor, and do not constitute rulings or findings of fact by this Court.

s/Joan H. Lefkow
U.S.M.J.



## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| HARRIS TRUST, et al., | ) | |
| Plaintiffs, | ) | |
| vs. | ) | No. 92 C 5883 |
| SALOMON BROTHERS, INC., et al., | ) | |
| Defendants. | ) | |

**RULING ON MOTION TO RECONSIDER OR CERTIFY FOR IMMEDIATE APPEAL**

Joan H. Lefkow, Magistrate Judge

Salomon has asked the court to reconsider two portions of its June 13, 1996 Memorandum Decision in light of the Supreme Court's recent decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1996 WL 305742 (June 10, 1996). Salomon urges that *Lockheed*'s discussion of ERISA § 1106(a) makes it clear that there is no private right of action against a nonfiduciary party in interest who engages in a transaction prohibited by § 1106, but even if there were, that is limited to circumstances where a nonfiduciary has knowingly participated in a fiduciary's violation of § 1106. As a result, Salomon argues, the Seventh Circuit's decision in *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994), would bar the claim.

As previously stated in open court, the *Lockheed* decision does not necessitate reconsideration of this court's June 13 Decision. Although the Court in *Lockheed* found that to sustain a claim under § 1106(a), a plaintiff must show that a fiduciary caused the plan to engage in one of the transactions identified in that section, it did not state or even suggest that a nonfiduciary party in interest who benefitted from such an impermissible transaction cannot be held liable for restitution once such a showing is made. *Lockheed*, 116 S. Ct. at 17888-89, 1996 WL 305742, at *4. To the contrary, the Court specifically noted that the appellate court in *Lockheed* "was not necessarily wrong in saying that 'a party in interest who benefitted from an impermissible transaction can be held liable under ERISA.'" *Id.* at n.3. The Ninth Circuit's error was that it found the employer party in interest liable without even asking whether a fiduciary caused the plan to enter into the transaction, i.e., there was insufficient proof that the transaction from which the party in interest benefitted was impermissible under § 1106(a).

As noted in the June 13 Decision, plaintiff has provided some proof that NISA was a fiduciary of the plan, that NISA caused APT to enter into the transactions at issue and that Salomon is a party in interest who benefitted from the transactions. Assuming these facts ultimately are proved, the transactions would be impermissible because they were outside the scope of NISA's lawful authority. Under such circumstances, *Lockheed*, does not preclude holding Salomon liable under ERISA for restitution of the benefits it received from the transactions. The court further disagrees that the Court's reasoning in *Lockheed* effectively limits recovery against nonfiduciary parties in interest to those situations where the party in interest "knowingly participates" in the fiduciary's breach of its fiduciary duties. For the reasons amply discussed in the June 13 Decision, the court concludes that nonfiduciary parties in interest may be held responsible for their direct participation in or as beneficiary of § 1106(a)



transactions. This is separate from the question whether they may be held liable for their knowing aid to the fiduciary in causing the plan to engage in the transaction – a question that is not before this court. The motion for reconsideration will be denied.

Alternatively, Salomon seeks certification of two specific issues for appeal to the Seventh Circuit Court of Appeals under 28 U.S.C. § 1292(b). As a general matter, certification of a question for interlocutory appeal is the exception, not the rule. Nevertheless, a district court has discretion to grant such a motion where 1) the matter to be appealed involves a controlling question of law, 2) on which there is substantial ground for difference of opinion, and 3) immediate appeal could materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Plaintiffs' have not seriously disputed the first of these factors. Indeed, the determination from which Salomon seeks leave to appeal – the availability and scope of a private right of action under ERISA for equitable relief against nonfiduciary parties in interest – if incorrect, would seemingly lead to the dismissal of plaintiff's only remaining federal claim. The second factor – whether there is a substantial ground for difference of opinion on the issue(s) be appealed – is hotly disputed. Salomon, of course, believes that under *Lockheed* a private right of action against a nonfiduciary party in interest is nonexistent or, at the very least, its existence is an open question. Plaintiffs, by contrast, believe that the decision in *Lockheed*, merely confirms that which the circuit courts, at least those which have considered the issue, have already recognized, namely, that there is such a private right of action. Although a number of circuit courts have recognized a cause of action and this court was ultimately persuaded to agree, that alone does not demonstrate that there is no substantial ground for difference of opinion. In ruling on the parties' cross-motions for summary judgment, each side offered an abundance of

thoughtful arguments to support their respective positions. Thus, even though this court concluded that plaintiffs' arguments and authority were more persuasive, it cannot be said that the arguments supporting an opposite conclusion were insubstantial.

Nevertheless, before an issue can be certified for appeal, the district court must further be convinced that immediate appeal from the order in question will materially advance the ultimate termination of the litigation. The court does not believe that Salomon has made such a showing. If the appellate court upholds this court's ruling, it would offer little benefit in terms of simplifying the issues for trial and it would disadvantage both parties by delaying the final resolution of a matter that has already been in litigation more than four years, before two different judges. Even assuming that the Seventh Circuit were to reverse the June 13 Decision, it is highly likely that the parties would move forward toward a trial of the remaining issues. While the burden of trial might be shifted to another court, e.g., state court, an immediate appeal would not certainly advance the ultimate termination of the litigation. Indeed, the delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter suggest that regardless of the outcome, an immediate appeal would be a disservice to the litigants and the general administration of justice.

**ORDER**

For the reasons stated, it is hereby ordered that defendant's motion for reconsideration of this court's decision and order of June 13, 1996 or, in the alternative, to amend the court's order so as to certify it for interlocutory appeal [Docket Nos. 196-1 and –2] is denied in its entirety. Plaintiffs are further directed to file their response to Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims [Docket No. 122] on or before



October 25, 1996, and defendant shall file any reply thereto on or before November 8, 1996.

ENTER:

s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW

Dated: September 24, 1996

## APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | |
|---|---|
| HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, Plaintiffs, | ) CIVIL ACTON<br>) No. 92 C 5883<br>)<br>) MEMORANDUM AND ORDER<br>) ON DEFENDANTS' RENEWED<br>) MOTION (1) TO AMEND JUDGE<br>) LEFKOW'S JUNE 1996 ORDER<br>) TO CERTIFY THE ORDER FOR<br>) INTERLOCUTORY APPEAL PUR-<br>) SUANT TO 28 U.S.C. § 1292 |
| vs. | ) (b), OR (2) TO RECONSIDER<br>) RULINGS ON TWO CONTROL- |
| SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP., Defendants. | ) LING LEGAL ISSUES IN JUDGE<br>) LEFKOW'S JUNE 1996 ORDER<br>) |

The plaintiffs filed this action against the defendants in September 1992. Through numerous motions and orders, most of the plaintiffs' original claims have been dismissed. At the present time, only one claim remains. The case has been assigned to me from Judge Lefkow, and the defendants have filed a renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order. Both parties have filed briefs, and I have reviewed the relevant documents in this case. I shall grant the defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal.



## ANALYSIS

The defendants motion to certify for interlocutory appeal involves two issues:

1) Does 29 U.S.C. § 1132(a)(3) affirmatively authorize a private right of action against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited by 29 U.S.C. § 1106(a), and

2) If so, is proof that such nonfiduciary party-in-interest knew it was a service provider to a pension plan and was engaged in a transfer of property with the plan or its fiduciary sufficient to hold such nonfiduciary liable under such private right of action – even if there is no proof that such nonfiduciary (i) knew that the transaction was a nonexempt prohibited transaction in violation of 29 U.S.C. § 1106(a) and (ii) knew that the fiduciary had caused the plan to engage in such transaction in breach of its fiduciary duties.

The statutory authority allowing for interlocutory appeals is found in 28 U.S.C. § 1292(b). This section gives the district court discretion to grant a motion for interlocutory appeal in cases where (1) the matter being appealed involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) where an immediate appeal from the order may materially advance the ultimate termination of the litigation.

I concur with Judge Lefkow's finding that the matters being appealed involve controlling questions of law and that even though she determined that a private right of action exists under § 1132, there is still a substantial ground for difference of opinion on this issue. Therefore, the first two factors for determining whether I may grant a motion for interlocutory appeal are met to my satisfaction. However, in order for me to amend Judge Lefkow's previous order and grant the defendants' motion for interlocutory appeal, I must find that

an immediate appeal may materially advance the ultimate termination of the litigation.

Judge Lefkow denied the defendants' motion to certify this issue for interlocutory appeal on September 24, 1996. One reason for denying the defendants' motion was that "[e]ven assuming that the Seventh Circuit were to reverse the June 13 decision, it is highly likely that the parties would move forward toward a trial of the remaining issues." *See* 9/24/96 Order at 4. Also, Judge Lefkow found that a reversal might shift the burden of trial to a state court, and the "delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter . . . would be a disservice to the litigants and the general administration of justice." *Id.* at 4-5. For these reasons, Judge Lefkow held that immediate appeal would not materially advance the ultimate termination of the litigation.

Subsequent to Judge Lefkow's September 24, 1996, order the defendants filed a motion for summary judgement on the plaintiffs' state law claims. Judge Lefkow granted the defendants' motion. Therefore, only one claim remains and there is no longer a concern that the parties would likely move forward to trial should the Seventh Circuit reverse Judge Lefkow's rulings. Additionally, the case has now been transferred to me, and so it is inevitable that a new judge will have to familiarize himself or herself with the complex facts and legal issues surrounding this case. Therefore, the two main reasons that Judge Lefkow denied the defendants' motion are no longer relevant, and it seems to me that an immediate appeal may materially advance the ultimate termination of the litigation.

Since I find that there is substantial ground for difference of opinion as to these controlling questions of law and that an immediate appeal from Judge Lefkow's order may materially advance the ultimate termination of this litigation, I shall



certify an interlocutory appeal from Judge Lefkow's September 24, 1996, order pursuant to 28 U.S.C. § 1292(b).

**IT IS THEREFORE ORDERED** that the defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal is granted in accordance with this order.

Dated January 7, 1998

BY THE COURT

s/Warren K. Urbom
United States Senior Judge

## APPENDIX F

### Statutory Provisions

1. Section 4975 of Title 26, United States Code, provides in part as follows:

**§ 4975. Tax on prohibited transactions**

**(a) Initial taxes on disqualified person**

There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

**(b) Additional taxes on disqualified person**

In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

**(c) Prohibited transaction**

**(1) General rule**

For purposes of this section, the term "prohibited transaction" means any direct or indirect—



(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

* * *

**(e) Definitions**

* * *

**(2) Disqualified person**

For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—



(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

* * *

**(f) Other definitions and special rules**

For purposes of this section—

* * *

**(5) Correction**

The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

* * *

**(h) Notification of Secretary of Labor**

Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

2. ERISA § 3, 29 U.S.C. § 1002, provides in part as follows:

**§ 3. Definitions**

For purposes of this title:

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer,



trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.[,]

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 [26 U.S.C. § 501(c)(22)] is permitted to make payments under section 4223 [29 U.S.C. § 1403] shall be treated as a party in interest with respect to such trust.

* * *



(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

3. ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), provides as follows:

**§ 406. Prohibited transactions**

**(a) Transactions between plan and party in interest**

Except as provided in section 408 [29 U.S.C. § 1108]:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107(a)].



4. ERISA § 408(a), 29 U.S.C. § 1108(a), provides as follows:

**§ 408. Exemptions from prohibited transactions**

**(a) Grant of exemptions**

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) [29 U.S.C. §§ 1106, 1107(a)]. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) or 407(a) [29 U.S.C. §§ 1106(a) or 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 U.S.C. § 1106(b)] unless he affords an opportunity for a hearing and makes a determination

on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

5. ERISA § 502(a), 29 U.S.C. § 1132(a), provides in part as follows:

> **§ 502. Civil enforcement**
>
> **(a) Persons empowered to bring a civil action**
>
> A civil action may be brought—
>
> * * *
>
> (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;
>
> * * *
>
> (5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

6. ERISA § 502(i), 29 U.S.C. § 1132(i), provides as follows:

> **(i) Administrative assessment of civil penalty**
>
> In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such



> party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 4975(f)(4)]) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 U.S.C. § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 U.S.C. § 4975(e)(1)].

(3)

No. 99-579

Supreme Court, U.S.
FILED
DEC - 3 1999
OFFICE OF THE CLERK

IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

*Petitioners*,

—v.—

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF OF RESPONDENTS IN OPPOSITION

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105 pp

## QUESTION PRESENTED

Does the Employee Retirement Income Security Act ("ERISA") affirmatively authorize a private cause of action against a *non*fiduciary party-in-interest on the theory that a nonfiduciary's entry into a "prohibited transaction" constitutes a "direct" violation by the nonfiduciary of ERISA § 406(a), 29 U.S.C. § 1106(a), notwithstanding that: (a) the statutory language of § 1106(a) ("a fiduciary ... shall not cause the plan to engage" in a prohibited transaction) prohibits conduct only by fiduciaries; (b) the legislative history demonstrates that Congress specifically considered imposing civil liability on *non*fiduciary parties-in-interest for participating in prohibited transactions, but opted not to; and (c) this Court has expressed an unwillingness to infer private causes of action under ERISA?

There is also an alternative ground for affirmance here, even if this Court were to allow such an implied private cause of action, that presents a further question: whether liability under any such implied cause of action may be imposed upon a nonfiduciary party-in-interest even if it did *not* know that the fiduciary who caused the plan to engage in the transaction was violating § 1106(a); here, petitioners failed to proffer admissible evidence that respondent Salomon knew that a fiduciary was violating § 1106.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

The successor-in-interest to respondent Salomon Brothers Inc is Salomon Smith Barney Inc. Both Salomon Smith Barney Inc. and respondent Salomon Brothers Realty Corp. are wholly owned by Salomon Brothers Holding Company Inc., which in turn is wholly owned by Salomon Smith Barney Holding Inc., which in turn is wholly owned by Citigroup Inc., whose stock is publicly traded.



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## TABLE OF SELECTED ABBREVIATIONS

| | |
|---|---|
| App. | Appendix accompanying Petition for Writ of Certiorari |
| Pet. | Petition for Writ of Certiorari |
| RA | Respondents' Appendix (attached hereto) |
| Sal. C.A. App. | Salomon's Supplemental Appendix in the Court of Appeals |

## STATUTORY PROVISIONS INVOLVED

Supplementing (or providing in more complete form) the provisions that petitioners identify (Pet. 2), pertinent portions of 29 U.S.C. §§ 1104, 1105, 1106, 1108, 1109 and 1132 are reproduced in the Respondents' Appendix at RA1-18.

## STATEMENT OF THE CASE

In a unanimous decision, the Seventh Circuit held that ERISA does not provide a private cause of action against a *non*fiduciary party-in-interest under 29 U.S.C. § 1106, rejecting petitioners' theory that such nonfiduciary's entry into a "prohibited transaction" constitutes a "direct" violation of § 1106(a). The panel circulated its opinion to all judges of the court in regular active service, recognizing that the decision created a circuit split. Only one judge voted to rehear the case *en banc*. *See* App. 13a n.1.

Petitioner Ameritech Pension Trust ("APT") is a trust for two employer-funded defined-benefit plans sponsored by petitioner Ameritech Corporation ("Ameritech Corp."). *See* Sal. C.A. App. 295, 354. This case arises from the purchase by APT from respondent Salomon of participation interests in cash flow and appreciation of four groups of motel properties. As the Court of Appeals observed, these purchases followed extensive negotiations between Salomon, which offered the participation interests for sale, and National Investment Services of America ("NISA"), investment manager and fiduciary of APT, and Ameritech Corp. *See* App. 2a. In the early 1990s, the nationwide market for hotel and motel real property collapsed; APT incurred losses on the investments and petitioners then sued Salomon. *See* App. 2a. The operative Second Amended Complaint contained 12 counts, 11 of which the district court dismissed. *See* App. 14a-55a; Sal. C.A. App. 58-85.[1]

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[1] Petitioners are sometimes collectively referred to herein as "Ameritech" and respondents as "Salomon". References to "App. ___" are to the specified pages in petitioners' appendix before this Court.

The case was before the Court of Appeals on a § 1292(b) interlocutory appeal. In the June 1996 Order that was the subject of the interlocutory appeal, the district court granted summary judgment dismissing two of Ameritech's three ERISA counts, but denied summary judgment as to a portion of the third. Count I, which alleged that Salomon was a fiduciary that had breached its fiduciary duties, was dismissed because Ameritech had not presented admissible evidence that Salomon was a fiduciary of APT. *See* App. 20a-30a. Count III alleged that fiduciary NISA (*not* named as a defendant) breached its fiduciary duties by causing APT to enter into prohibited transactions with Salomon in violation of § 1106 and that Salomon was liable for having "knowingly participated" in NISA's breach of fiduciary duty. The district court dismissed Count III because it concluded that nonfiduciaries cannot be found liable for knowing participation in another person's fiduciary breaches. *See* App. 51a-52a.

Count II alleged that Salomon was a *fiduciary* that had "caused the Plan to engage in" § 1106(a) prohibited transactions. Sal. C.A. App. 296, 302-03. The district court dismissed any claims in Count II "which are premised on an alleged breach of fiduciary duty". App. 55a. However, in the district court plaintiffs had recharacterized their Count II claim as (at least in part) a purported "direct" cause of action for violation of § 1106, assertable against Salomon as a *non*fiduciary party-in-interest that entered into a prohibited transaction (even if it did *not* know that the fiduciary who caused the plan to engage in the transaction had violated § 1106). The district court upheld that recharacterized claim. *See* App. 30a-41a. Count II contains no allegation that someone *other than* Salomon was a fiduciary who caused APT to engage in "prohibited transactions" in violation of § 1106. *See* Sal. C.A. App. 302-04.

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References to "Sal. C.A. App. ___" are to the specified pages in Salomon's Supplemental Appendix in the Court of Appeals; respondents would be pleased to provide additional copies to this Court if requested.



On the interlocutory appeal from the June 1996 order, Salomon sought reversal of the district court's ruling upholding Count II in part (the purported "direct" § 1106 cause of action against a nonfiduciary party-in-interest). Ameritech did *not* cross-appeal or otherwise contest the dismissal of Count I (breach of fiduciary duty), Count II (to the extent premised on an alleged breach of fiduciary duty) or Count III (participation-in-fiduciary-breach).

At no point was there a determination of Ameritech's allegations that Salomon was a party-in-interest or that the transactions were nonexempt prohibited transactions, and (as the Seventh Circuit observed) Salomon disputes these matters. *See* App. 6a. In addition, were there to be further proceedings, Salomon would also dispute many of the "facts" asserted by Ameritech. *See* Pet. 6-8. For purposes of the interlocutory appeal, the Seventh Circuit assumed the validity of Ameritech's allegations, but ordered summary judgment for Salomon because it held that a *non*fiduciary party-in-interest cannot be liable under § 1106 for entering into a prohibited transaction. *See* App. 12a-13a.

## REASONS FOR DENYING THE WRIT

Several considerations specific to this case compromise its utility as a vehicle for review of whether ERISA affirmatively authorizes a private cause of action against a nonfiduciary party-in-interest for participation in a prohibited transaction.

- *First*, Ameritech relies here *only* on the claim that a nonfiduciary party-in-interest's entry into a "prohibited transaction" constitutes a "direct" violation by the nonfiduciary of § 1106. In the Court of Appeals, Ameritech disclaimed and waived any claim that a nonfiduciary party-in-interest may be held liable for its participation in a *fiduciary's breach* of § 1106. Yet — in light of this Court's recent decisions, including *Mertens* v. *Hewitt*, 508 U.S. 248 (1993), and *Lockheed* v. *Spink*, 517 U.S.

882 (1996) — a participation-in-fiduciary-breach claim (such as that urged in the *Mertens dissent*) may be the only even potentially viable grounds for imposing liability upon nonfiduciary parties-in-interest. It would not serve this Court well to address the validity of a "direct" violation claim in a case where, as a result of Ameritech's disclaimer and waiver, the issue of the validity of a claim for participation in a fiduciary's breach of § 1106 is not before this Court. *See* Point I(A), *infra*.

- *Second*, the decision below was rendered on a § 1292(b) interlocutory appeal, and further proceedings may alter the posture of this case. Indeed, Ameritech has suggested that it may try to revive previously dismissed claims that Salomon was a fiduciary; if Ameritech succeeds in this effort (over Salomon's objections), the issue of nonfiduciary liability raised in the Petition could be mooted. *See* Point I(B), *infra*.

- *Third*, there is an independent ground for affirmance here: even if the putative private cause of action against a nonfiduciary party-in-interest exists, Ameritech did not offer admissible evidence sufficient to satisfy what must be the scienter requirement of any such cause of action. *See* Point I(C), *infra*.

In view of "the number of reported decisions" (Pet. 11) concerning the issue of nonfiduciary liability for participation in prohibited transactions, this Court is likely to have ample opportunity to address the question presented in other cases that may arise in a more appropriate posture for review.

Furthermore, particularly in light of the foregoing considerations, it is appropriate to permit further development in the Courts of Appeals of the issues surrounding nonfiduciary liability for participation in prohibited transactions. *See* Point II, *infra*. Finally, there is no compelling reason to review this specific case. The Seventh Circuit's decision does not compromise ERISA enforcement (*see* Point III, *infra*), and correctly adheres to the plain language of the statute and this Court's precedents that decline to imply private rights of action under ERISA (*see* Point IV, *infra*).



## I. THE PROCEDURAL HISTORY AND CURRENT POSTURE OF THIS CASE COMPROMISE ITS UTILITY AS A VEHICLE FOR REVIEW.

### A. Ameritech's disclaimer and waiver of any claim that a nonfiduciary party-in-interest may be liable for participating in a fiduciary's breach of § 1106.

**1. Ameritech's disclaimer and waiver.** The Petition makes clear that Ameritech presses in this Court *only* a claim that a nonfiduciary party-in-interest may be held liable for its supposed "direct" violation of § 1106: "The relevant claim for present purposes is Count II." Pet. 8. As noted (p. 2, *supra*), any claim in Count II "premised on an alleged breach of fiduciary duty" was dismissed (and such dismissal was not contested on appeal). And, in any event, Count II contains no allegation that any party *other than* Salomon caused APT to engage in "prohibited transactions" in violation of § 1106, much less an allegation that Salomon is liable for participating in a fiduciary's breach.

In addition, the Petition does *not* contest the considered dictum of *Mertens* v. *Hewitt*, 508 U.S. at 253-55 & n.5 — which the Petition acknowledges has been "widely followed by the lower courts" — that "no cause of action is available under ERISA against a non-fiduciary for assisting a fiduciary in violating its fiduciary obligations under the statute". Pet. 16. Instead, Ameritech argues only that the absence of a participation-in-fiduciary-breach claim does not necessarily preclude the existence of a "direct" claim. *See* Pet. 16-17.

Moreover, in the Court of Appeals, Ameritech waived any participation-in-fiduciary-breach claim and thus could not properly advance such a claim in this Court were *certiorari* to be granted. Ameritech's Count III did plead a claim that

Salomon was liable for participating in a fiduciary's breach of duty. As the district court summarized:

> Count III alleges that Salomon *knowingly participated in NISA's breach of its fiduciary duties to APT* by selling the interests in the fee agreements to NISA for APT's benefit. In other words, *plaintiffs contend that Salomon is secondarily liable for its knowing participation in NISA's involvement in a § 1106 prohibited transaction.* (App. 51a (emphasis added)).

The district court dismissed Count III, explaining that — although it upheld Count II in part since "§ 1106 can be read to affirmatively impose an obligation on parties in interest to avoid [prohibited] transactions" — Count III failed because "status as a party-in-interest ... does not subject such persons to derivative liability for another's violation of ERISA". App. 51a.

Ameritech did not cross-appeal from, or otherwise seek to raise in the Court of Appeals, that aspect of the district court's June 1996 order that dismissed Count III. Indeed, in the Court of Appeals, Ameritech disavowed reliance on any participation-in-fiduciary-breach theory and, instead, consistently emphasized that its theory of § 1106(a) liability was "direct", *not* secondary. *See, e.g.*, Brief of Appellees at 37 ("As the district court made clear, 'Salomon's liability [under Count II] is premised on a direct violation of [§ 1106], and not, as Salomon argues, on secondary liability for knowing participation in NISA's breach.'"). The Seventh Circuit did not pass upon Count III, and in fact noted that Ameritech had waived its participation-in-fiduciary-breach claim.[2]

[2] The Seventh Circuit noted that "plaintiffs have wisely abandoned their claim against Salomon for participating in a breach of fiduciary duty under § 1104." App. 5a-6a. This is a reference to Count III, where Ameritech asserted that NISA violated its fiduciary duties by entering into § 1106 prohibited transactions with Salomon, and that Salomon could therefore be sued under § 1104 for knowing participation in NISA's fiduciary breach. *See, e.g.*, App. 51a; Sal. C.A. App. 305.



This Court consistently has refused to consider issues litigated in the district court but not appealed to the court of appeals, and has even stated that it "cannot" consider an issue waived in that fashion. *See, e.g., Boeing* v. *Van Gemert*, 444 U.S. 472, 479 n.5 (1980) ("Since [petitioner] did not appeal it, we cannot now consider whether the judgment [of the district court] was in error"); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 244 (1985); *Kosak* v. *United States*, 465 U.S. 848, 850 & n.3 (1984); *Marsh* v. *Chambers*, 463 U.S. 783, 793 n.15 (1983); *Delta Air Lines* v. *August*, 450 U.S. 346, 362 (1981); *Adickes* v. *S.H. Kress*, 398 U.S. 144, 147 n.2 (1970); *see also, e.g., Auer* v. *Robbins*, 519 U.S. 452, 464 (1997) (declining to consider argument "inadequately preserved in the prior proceedings") (citing *Adickes*).

Furthermore, where "central issues on which resolution of the question presented may well turn cannot be reached or resolved" by this Court because the petitioner failed to raise them in the Court of Appeals, this Court has dismissed a writ of *certiorari* as improvidently granted. *Equal Employment Opportunity Comm'n* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 24 (1986). And here, what Ameritech waived was not only an argument or an issue rejected by the district court, but also portions of Ameritech's original claims for relief; and here respondents are expressly identifying the waiver and objecting to any assertion in this Court of any participation-in-fiduciary-breach claim.

**2. In light of *Mertens* and *Spink*, a participation-in-fiduciary-breach claim may be the only even potentially viable grounds for imposing liability upon nonfiduciary parties-in-interest.** In *Mertens*, this Court held that § 1132(a)(3) does not authorize compensatory damages, but instead permits only "equitable relief" in a suit against a nonfiduciary who knowingly participates in a fiduciary's breach. *See* 508 U.S. at 251, 255-63. In considered dictum, the majority also expressed pointed doubt about the threshold issue: whether a nonfiduciary's participation ("knowing or unknowing") in a fidu-

ciary's breach of duty violates ERISA, and thus whether ERISA "affirmatively authorizes" a private cause of action against such a nonfiduciary — reemphasizing this Court's "unwillingness to infer causes of action in the ERISA context". 508 U.S. at 253-55 & n.5. By contrast, Justice White's dissent expressed the view that there could be a private cause of action against a nonfiduciary for knowing participation in a fiduciary breach. *See* 508 U.S. at 266 n.1. One year later, this Court reinforced the significance of the majority's considered dictum in *Mertens* when it reiterated that the "omission of knowing participation liability in ERISA 'appears ... deliberate'" and observed that *Mertens* "rejected" the argument that a "knowing participation cause of action ... should be available under ERISA". *Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 175, 184 (1994).

In light of this Court's opinions in *Mertens* and *Central Bank*, Ameritech may correctly have viewed continued advocacy of a participation-in-fiduciary-breach theory of liability as an uphill battle. Nevertheless, this Court's subsequent decision in *Lockheed* v. *Spink*, 517 U.S. 882 (1996), makes clear that the participation-in-fiduciary-breach theory waived by Ameritech may be the only even potentially viable grounds for imposing liability on a nonfiduciary party-in-interest that enters into a § 1106 prohibited transaction. In *Spink*, the Ninth Circuit had held the defendant liable as a party-in-interest that benefited from a § 1106 prohibited transaction. This Court reversed, ruling that the Ninth Circuit "erred by not asking whether fiduciary status existed in this case" on the part of the defendant employer-plan sponsor "before it found a violation of [§ 1106(a)(1)]." *Id.* at 889. This Court held that: "[I]n order to sustain an alleged transgression of [§ 1106(a)], a plaintiff must show that a *fiduciary caused* the plan to engage in the allegedly unlawful transaction." *Id.* at 888 (emphasis added); *see also id.* ("[§ 1106] prohibits *fiduciaries*") ("[§ 1106(a)(1) regulates the conduct of plan *fiduciaries*"); *id.* at 889 n.3 ("the *only* transactions rendered *impermissible* by [§ 1106(a)] are transactions *caused by fiduciaries*"); *id.* at 893 ("[§ 1106(a) prohibits *fiduciaries*") (emphasis added).



After *Spink*, Ameritech conceded that "*fiduciary causation* is a *prerequisite* for nonfiduciary party-in-interest liability under [§ 1106]" and that "[t]he presence of a party-in-interest alone is not enough". Sal. C.A. App. 478-79 (emphasis added). In other words, in light of *Spink*, and as Ameritech conceded, any liability of a nonfiduciary party-in-interest — were it to exist — must be *dependent upon* the court first finding that a fiduciary violated § 1106. But any such claim dependent upon a finding that a fiduciary violated § 1106 would in substance be the very secondary-liability, participation-in-fiduciary-breach claim that Ameritech in this case has waived. If § 1106 imposed an *independent* duty on nonfiduciary parties-in-interest, how could it logically be a prerequisite in every case to find that a fiduciary violated § 1106?[3]

The decisions from other courts of appeals on which the Petition relies do not alter the conclusion that a participation-in-fiduciary-breach theory may be the only potentially viable theory remaining after *Lockheed* v. *Spink*. In fact, one of those decisions, *LeBlanc* v. *Cahill*, 153 F.3d 134 (4th Cir. 1998), sometimes even refers to the private cause of action it upheld as "knowing participation in *an ERISA fiduciary's breach* of

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[3] For example, the distinction in the securities field between direct Rule 10b-5 claims (for which a private right of action exists) and dependent secondary-liability claims (as to which *Central Bank* rejected a private right of action) has turned on whether proof of a violation by another is required: (1) "primary violators" could be sued for their own misconduct irrespective of conduct of others, but (2) a dependent secondary claim had required the existence of a "primary violation." *See, e.g.*, *Central Bank*, 511 U.S. at 168, 194 ("the existence of a primary violation" was an element of the 10b-5 aiding-and-abetting claim recognized in the lower courts); Loss & Seligman, *Securities Regulation*, Chap. 11c at 4479 (3d ed. 1990) (same); *DiLeo* v. *Ernst & Young*, 901 F.2d 624, 628 (7th Cir. 1990) ("there can be no liability on an aiding-and-abetting theory unless ... someone committed a primary violation").

[§ 1106]". *Id.* at 149-151 (emphasis added). The other courts of appeals decisions either pre-date *Spink* or do not consider the implications of *Spink's* ruling that a fiduciary's breach of its § 1106 duties is a prerequisite to any § 1106 claim.

**3. Ameritech's disclaimer and waiver compromise the utility of this case as a vehicle for review.** Even if one were to assume (hypothetically) that both a "direct" violation claim and a participation-in-fiduciary-breach claim were potentially viable theories, the fact remains that in this case *only* the "direct" violation claim would be before this Court — and *not* the participation-in-fiduciary-breach theory urged in the *Mertens* dissent. Thus, Ameritech's disclaimer and waiver would at the very least pose impediments to this Court's full consideration of the subject of claims against nonfiduciary parties-in-interest for entering into prohibited transactions. This Court should await a more appropriate case: a case that is not encumbered with the disclaimer and waiver problems posed here.

### B. The decision below was rendered on a § 1292(b) interlocutory appeal.

The case at bar arises in the context of a § 1292(b) interlocutory appeal decided by the Seventh Circuit. Further proceedings may alter the posture of this case. Ameritech has asserted that, after final judgment is entered in the district court, it may seek to appeal the district court's "fiduciary rulings" in the June 1996 Order. 7/26/99 Motion of Plaintiffs-Appellees to Stay Mandate, at 5, ¶ 8.[4] The issue of *non*fiduciary liability raised in the Petition could be mooted if (over Salomon's opposition) Ameritech were to succeed on such an appeal and ultimately establish that Salomon is liable as a fiduciary. Also,

[4] Salomon's position is that Ameritech has waived any right to appeal or otherwise revisit the rulings in the June 1996 Order adverse to Ameritech, including the district court's dismissal of any claim premised upon Salomon allegedly having been a fiduciary or upon an alleged breach of fiduciary duty.



Ameritech has further stated that on remand to the district court it will seek to have that court reconsider its prior determination that Ameritech's state law claims are preempted. *See id.*

In addition, the interlocutory posture of this case may render it a less than optimal vehicle for review by this Court of the issues surrounding nonfiduciary liability for entering into prohibited transactions, as contrasted with alternative cases arising after final judgment. For example, the question presented in the instant Petition is whether there exists a private cause of action (i) against a nonfiduciary party-in-interest (ii) for entering into nonexempt prohibited transactions. Here, there has been no determination that (i) Salomon *was* a party-in-interest or (ii) that the transactions *were* nonexempt prohibited transactions. *See* p. 3, *supra*. Also, as discussed below, the issue of the scienter requirement for the asserted private cause of action remains to be addressed.

### C. Ameritech's failure to proffer admissible evidence that Salomon knew that a fiduciary was violating § 1106 provides an independent ground to affirm the judgment below.

In the Seventh Circuit, Salomon argued in the alternative that — even if the posited private cause of action exists — a plaintiff must prove that the nonfiduciary party-in-interest knew at the time of the transaction that the fiduciary who caused the plan to engage in the transaction was violating § 1106(a). Yet Ameritech had presented *no* admissible evidence that Salomon had the requisite knowledge. The Seventh Circuit never reached this alternative ground. Nevertheless, were the Court to grant *certiorari*, Salomon would be entitled to rely on this ground for affirmance. *See, e.g., Jones* v. *United States*, 119 S. Ct. 2090, 2106 (1999); *United States* v. *X-Citement Video*, 513 U.S. 64, 78 (1994).[5]

[5] Contrary to Petitioners' assertion (Pet. 6 n.3), since this case arises in the context of summary judgment, the facts alleged by petitioners should *not* be taken as proven unless they are supported by admis-

**1. Knowledge that a fiduciary was violating § 1106(a) must be an element of any § 1106(a) claim against a nonfiduciary party-in-interest.** Once the district court chose to imply a cause of action, it then had to discern its elements (including the level of scienter required) — but of course had no statutory statement of the elements to rely upon. The result was the district court's conclusion that a nonfiduciary party-in-interest can be liable even if it did *not* know that the fiduciary violated § 1106(a). *See* App. 42a.

For the fiduciaries § 1106(a) does expressly regulate, § 1106(a) includes an express scienter standard ("knows or should know"). And the *rejected* Senate bills that would have imposed civil liability on nonfiduciary parties-in-interest *did* include express scienter standards. *See* RA19-21. The silence of § 1106(a), as enacted, concerning any scienter standard applicable to a *non*fiduciary further underscores that ERISA does not provide the cause of action Ameritech posits.

In any event, *Spink* makes clear that a nonfiduciary party-in-interest cannot be liable unless the court first finds that a fiduciary violated § 1106. *See* Point I(A)(2), *supra*. It follows from the dependent nature of any hypothetical "§ 1106 claim" against a nonfiduciary party-in-interest that knowledge by it that the fiduciary was violating § 1106 must be an element. Knowledge of the fiduciary's breach was required for the *knowing*-participation claim that the *Mertens* majority rejected. *See, e.g., McDougall* v. *Donovan*, 539 F. Supp. 596, 598 (N.D. Ill. 1982).[6] If knowledge of the fiduciary's violation was required for a pre-*Mertens*, dependent, knowing-participation claim, it surely must be required for any (hypothetical) dependent "§ 1106 claim" against a nonfiduciary party-in-interest that might exist after *Mertens* and *Spink*. One cannot fairly construe *Mertens* — with its emphasis on restricting remedies and rights of action — as *expanding* the circumstances under which a nonfiduciary party-in-interest can be liable by (implicitly) overruling pre-*Mertens* case law that required proof of *knowing* participation to impose liability on a nonfiduciary party-in-interest.

sible evidence in the district-court record. *See, e.g.*, Fed. R. Civ. P. 56(e); *Anderson* v. *Liberty Lobby*, 477 U.S. 242, 255 (1986); *Behrens* v. *Pelletier*, 516 U.S. 299, 309 (1996); Wright, Miller & Kane, *Federal Practice and Procedure*, Civil 3d § 2727 at 460 (1998).

[6] *McDougall*, in ruling that a nonfiduciary party-in-interest could be held liable for knowingly participating in a fiduciary's violation of § 1106, erroneously relied on a 1973 Senate committee report on a proposed bill (S. 4) — which was *not* enacted — that would have expressly authorized civil actions against "any person" who received plan assets (Sal. C.A. App. 128-29). *See id.* 145-46, *cited in* 539 F. Supp. at 598. The



Furthermore, even a *co-fiduciary* who participates in a prohibited transaction caused by another fiduciary can be liable only if such co-fiduciary "*know[s] such act or omission [by the other fiduciary] is a breach*" (§ 1105(a)(1)) (emphasis added) — *i.e.*, knows that the fiduciary is violating § 1106. *See also* House Conference Report No. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5080 (to be liable, the co-fiduciary, among other things, "must know that he participated in the act that constituted a breach, *and must know that it was a breach*") (emphasis added). Plainly, civil liability should not be imposed upon a *non*fiduciary party-in-interest upon less proof than required to hold a co-fiduciary liable.

**2. Ameritech did not offer admissible evidence that Salomon knew that a fiduciary was violating § 1106(a).** Ameritech offered *no* admissible evidence that Salomon knew at the time of the transactions (1987-1989) that a fiduciary of APT was violating § 1106(a). *See* Sal. C.A. App. 395-97. At the time, *no one* thought that the transactions violated § 1106, although Ameritech and NISA were fully aware of Salomon's business dealings with APT as well as these transactions. *See, e.g.*, Sal. C.A. App. 359, 393-406, 589-91, 594, 611, 616, 627, 632-35, 637-39, 649, 662, 670. Indeed, Ameritech's 1987, 1988 and 1989 filings

1973 Senate reports (Sal. C.A. App. 145, 148) concerning proposed (but *not* enacted) bills (*id.* at 126-30; 131-43) are irrelevant to whether ERISA *as enacted* creates a right of action against a nonfiduciary.

with the Department of Labor represented that there were *no* non-exempt prohibited transactions. *See* Sal. C.A. App. 397-408, 735-40, 778-84. That Ameritech and NISA did not at the time believe the transactions violated § 1106 underscores the total absence of evidence that *Salomon* somehow knew this (to say nothing of the absence of evidence that Salomon knew that Ameritech Corp. or NISA knew that *they* were violating § 1106).[7]

## II. FURTHER CONSIDERATION BY THE COURTS OF APPEALS WOULD BE APPROPRIATE BEFORE REVIEW BY THIS COURT.

The decisions of other circuits recognizing a private cause of action against nonfiduciary parties-in-interest reflect different conceptions of the nature of, and basis for, the cause of action, and none of them have concretely defined its elements. Particularly since, as discussed above, the procedural history and current posture of this case in any event com-

[7] As to other matters, Ameritech errs in asserting that "there is no dispute" that, if a § 1132(a)(3) action is available, the equitable remedies that can be obtained include restitution. *See* Pet. 13 n.9. The cause of action posited by Ameritech — a "direct" statutory tort against a nonfiduciary, *not* an equitable action for participation in a fiduciary breach — would be legal in nature. As the Seventh Circuit noted in an earlier case, "restitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case." *Reich* v. *Continental Casualty*, 33 F.3d 754, 756 (7th Cir. 1994), *cert. denied*, 513 U.S. 1152 (1995) (citing, *e.g.*, Dobbs, *Law on Remedies* §§ 1.2, 4.1(1), 4.1(3), 4.2-4.3 (2d ed. 1993)). Ameritech has articulated no theory under which its putative "direct" cause of action would constitute "an equity case". Also, even if restitution were deemed to be an equitable remedy here, were this action to be tried, Salomon would assert other defenses to the availability of such a remedy. Furthermore, Salomon also argued in the alternative in the Seventh Circuit that *if* a nonfiduciary party-in-interest can be held liable under § 1106(a), it is entitled to seek contribution from a fiduciary that violated § 1106. Recognizing that the Court of Appeals did not reach this argument, and that it does not constitute an independent grounds for affirmance, Salomon does not press this argument now, but reserves it should it become germane in the future.



promise its utility as a vehicle for review, it is respectfully submitted that the potential benefit from observing how the other circuits will respond to the Seventh Circuit's recent decision — and how any future cases that still uphold the disputed cause of action define its elements — further militates against granting *certiorari* here.

The decisions of the other circuits reflect an incomplete analysis and leave unresolved a number of questions:

- *How can a court uphold a private cause of action against nonfiduciary parties-in-interest if the legislative history shows that Congress considered providing that cause of action but opted not to?* Only the Tenth Circuit has even partially addressed the legislative history relied upon by the Seventh Circuit, and even the Tenth Circuit did not discuss the explicit recommendation of the Conference Committee staff that ERISA "*not* provide civil liability for parties-in-interest" (RA27 (emphasis added)). *Compare Harris Trust*, App. 11a-12a, *with Reich* v. *Stangl*, 73 F.3d 1027, 1032-34 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996).

- *What level of scienter is required for nonfiduciary liability?* Only the Ninth Circuit has directly addressed this question, but its holding that a party-in-interest may be liable "regardless of his lack of notice or knowledge" is limited to "gratuitous transferees" — as opposed to transferees who exchange value. *See Landwehr* v. *DuPree*, 72 F.3d 726, 734-35 (9th Cir. 1995).

- *What precisely is the operative theory of nonfiduciary liability?* Is it: (a) knowing participation in a *fiduciary's* breach of the *fiduciary's duty* under § 1106; (b) breach of the party-in-interest's *own* (supposed) *duty* under § 1106; or (c) a theory that, under § 1132(a)(3), a nonfiduciary may be subject to equitable remedies even though it breached *no duty* under § 1106? The other circuits are far from clear as to which theory they employ,

and none of them has addressed the impact of *Lockheed* v. *Spink* on its theory of liability. *See* pp. 8-10, *supra*.

There is no countervailing urgency in establishing uniformity between circuits that warrants granting *certiorari* in *this* case in its current posture. The potential for uniformity in denying the right of action is not by itself reason to grant *certiorari*. Indeed, in the past several years, this Court has declined the opportunity to review the question presented here — or variations of it — at least three times. *See Fickling* v. *Herman*, 119 S. Ct. 1030 (1999), *denying cert. from* 140 F.3d 1413 (11th Cir. 1998); *Stangl* v. *Reich*, 519 U.S. 807, *denying cert. from* 73 F.3d 1027 (10th Cir.) (1996); *Reich* v. *Continental Cas.*, 513 U.S. 1152 (1995), *denying cert. from* 33 F.3d 754 (7th Cir. 1994). Conversely, were this Court to conclude that the posited private cause of action should be inferred, uniformity might be achieved only if this Court were to proceed further and define its elements, including the knowledge requirement (an issue Salomon raised below, but which, in this case arising from a § 1292(b) interlocutory appeal, the Court of Appeals did not reach).

## III. THE SEVENTH CIRCUIT'S DECISION DOES NOT COMPROMISE ERISA ENFORCEMENT.

The Seventh Circuit's decision does not create the crisis of ERISA enforcement that Ameritech suggests. *See* Pet. 20-22. *First*, insofar as this case is concerned, *if* § 1106 was violated, there has been no showing that the responsible fiduciaries, Ameritech Corp. and NISA, could not compensate APT for any losses, and Ameritech Corp., with its $20 billion in assets, clearly can. *See* Sal. C.A. App. 353, 789. Furthermore, Ameritech's pension plans are employer-funded, defined benefit plans; Ameritech Corp. is obliged to pay fixed benefits irrespective of the investment performance of APT, and any losses suffered by APT based on poor investment performance are borne by Ameritech Corp., not retirees. *See* Sal.



C.A. App. 354. Specifically, any losses that APT may have suffered with respect to the participation-interest investments did not cost any Ameritech employee or retiree any money. *See id.*

*Second*, viewing the matter in a broader perspective, even though there is no private cause of action under ERISA against nonfiduciary parties-in-interest, suit can still be brought on behalf of plans under ERISA against any fiduciaries who violate § 1106 and co-fiduciaries who violate § 1105, as well as potentially against other persons under other federal laws or under state law, particularly if there is fraudulent conduct. In addition, as Ameritech recognizes (Pet. 21 n.14), there still exists the potential in appropriate cases for the Government to seek to undo prohibited transactions through (where applicable) IRC § 4975 excise taxes or § 1132(i) administrative penalties (each of as much as 100% of the amount involved).[8]

*Third*, allowing private civil actions *only* against fiduciaries may do more to further ERISA's aims than allowing suits against both fiduciaries and nonfiduciary parties-in-interest. If a fiduciary can shift liability for a violation of § 1106 to a *non*fiduciary party-in-interest, the force of the statutory proscription that a "fiduciary ... shall not cause" a plan to engage in a prohibited transaction could be diluted. In many cases, the fiduciary that caused the alleged § 1106(a) violation, or a co-fiduciary whose conduct violated § 1105, also controls who is sued. As this case demonstrates, fiduciaries with that control will rarely sue themselves: Here, substantial evidence indicates that fiduciary Ameritech Corp. caused APT to buy

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[8] As noted (p. 3, *supra*), Salomon disputes any allegation that it was a party-in-interest or that the transactions were nonexempt prohibited transactions, and Salomon disputes the applicability here of either § 4975 or § 1132(i). Of course, whether a remedy in fact exists in a particular case or against a particular party does not detract from the fact that Congress did provide expressly for certain remedies but omitted others. *See* pp. 20, 22-25, *infra*.

the participation interests.[9] Yet Ameritech Corp. is a plaintiff, not a defendant, and fiduciary NISA is not a party. By this lawsuit, APT's fiduciaries are attempting to shift to Salomon, a nonfiduciary, responsibility for an alleged violation of § 1106 that Congress placed squarely on them.

*Finally*, whether providing a private cause of action against nonfiduciaries would better promote "a basic policy goal" of ERISA (Pet. 21) is legally irrelevant. The *Mertens* plaintiffs likewise argued that, if plans cannot hold nonfiduciaries liable for participation in fiduciary breaches, plans might have no remedy, and that a construction of ERISA under which a plan lacked remedies that it had at common law was contrary to ERISA's "basic purpose" of protecting pension plans. *See* 508 U.S. at 261. But this Court held that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration. This is especially true with legislation such as ERISA...." *Id.* at 261-62 (internal citation omitted).

## IV. THE SEVENTH CIRCUIT'S DECISION ADHERES TO THE STATUTORY LANGUAGE AND CONTEXT, THE LEGISLATIVE HISTORY, AND THIS COURT'S PRECEDENTS.

### A. The statutory language

The question presented turns on the language of § 1106(a). The other section Ameritech refers to in its question presented, § 1132(a)(3), permits civil actions for "other appropriate equitable relief" to redress "any act or practice which violates" subchapter I of Title 29. But as the Seventh Circuit recognized, § 1132(a)(3) "only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act". App. 8a; *see also*

[9] *See, e.g.*, Sal. C.A. App. 368-93, 461-66, 593, 595-99, 604, 607-10, 612-13, 639, 668-69, 682-83, 687-92, 694-95, 724-28, 741-42, 758-68.



*Mertens* v. *Hewitt*, 508 U.S. at 253-55 & n.5. And even Ameritech acknowledged in the Seventh Circuit that whether a private cause of action exists against a nonfiduciary party-in-interest "depends entirely on the meaning of § 1106(a)". Brief of Appellees at 18. The question then is: Upon whom does § 1106 impose a duty to avoid prohibited transactions, violation of which may give rise to civil liability?

The text of § 1106(a) leaves no room to doubt that only a fiduciary can violate it, for it prohibits fiduciary conduct only: "[a] *fiduciary* with respect to a plan *shall not cause* the plan to engage in a transaction, if *he* knows or should know that such transaction constitutes" a nonexempt prohibited transaction (emphasis added). Section 1106(a) does *not* contain any comparable prohibition addressed to nonfiduciary parties-in-interest. No words of duty or prohibition, such as "shall not" are applied to nonfiduciary parties-in-interest. Further, § 1106(a) contains an express standard of culpability for fiduciaries who cause prohibited transactions, but says nothing about any culpability standard for *non*fiduciary parties-in-interest — an omission that makes sense only if § 1106 does not impose duties on nonfiduciary parties-in-interest. The "act" that "violates" § 1106 — and thus may potentially be subject to civil suit under § 1132(a) — can only be the act that § 1106 prohibits: a "fiduciary['s] ... caus[ing] the plan to engage in [the] transaction." As the Seventh Circuit observed, the "mere fact that § 1106 *mentions* 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction." App. 8a.

The Seventh Circuit's decision is faithful to the plain meaning of § 1106, and thus faithful to this Court's precedents — which consistently underscore that statutes are to be applied as written. As this Court reiterated earlier this year in another ERISA case: "[I]n any case of statutory construction, our analysis begins with 'the language of the statute.' ... And

where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft* v. *Jacobson*, 119 S. Ct. 755, 760 (1999); *see also, e.g., Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 176-78 (1994) (since the text of § 10(b) "does not itself" encompass aiders and abettors, "that conclusion resolves the case"); *Connecticut National Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992) ("we have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says").

Moreover, where — as here (*see* Point III, *supra*) — the statutory scheme expressly provides alternative methods of addressing the allegedly prohibited conduct, "'*it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under' the statute.*" *Meghrig* v. *KFC Western*, 516 U.S. 479, 487-88 (1996) (*emphasis added*). Rather, "'[i]t is an elemental cannon of statutory construction that *where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.*'" *Id.* (emphasis added).

These general principles have particular application in ERISA cases: this Court has pronounced its "*unwillingness to infer causes of action in the ERISA context*, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that *Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.*'" *Mertens*, 508 U.S. at 254 (quoting *Massachusetts Mut. Life Ins.* v. *Russell*, 473 U.S. 134, 146-47 (1985)) (emphasis added).

In place of simply reading § 1106 as it is written, Ameritech urges an alternative interpretation — unsupported by the text of the statute — based on multiple flawed assertions. *See* Pet. 12-13. *First*, Ameritech asserts that a party-in-interest "*necessarily*" is a counter-party to a prohibited transaction. Pet. 12. But the transactions enumerated in §§ 1106(a)(1)(D)-(E) and 1106(b) do *not* necessarily involve a party-in-interest



counter-party.[10] *Second*, even if (contrary to fact) parties-in-interest necessarily were counter-parties to all prohibited transactions, Ameritech's further assertion that "prohibiting the transaction from the fiduciary's side necessarily entails prohibiting it from the party in interest's side" (Pet. 12) is pure *ipse dixit*. Prohibiting conduct by the fiduciary alone — who has the power to cause the plan to engage in the transaction — makes eminent sense. In various other contexts, the United States Code contains "prohibited transaction" provisions directed to only one party to a transaction.[11] And the Congressional decision to subject only a fiduciary to civil liability is particularly logical given what otherwise would be the spectre of fiduciaries, through their choice of whom to sue, seeking to shift to nonfiduciaries responsibility for § 1106 violations. *See* pp. 17-18, *supra*. *Third*, Ameritech's assertion that "[i]t is the *transaction* that is prohibited" (Pet. 12) ignores that prohibitions are not abstractions — rather, of necessity, prohibitions regulate the behavior of a class of persons. In § 1106 — one component of Part 4, "Fiduciary Responsibil-

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10 Indeed, in cases Ameritech itself relies upon, the Third Circuit upheld a cause of action against nonfiduciary *non*-parties-in-interest for participating in a prohibited transaction. *See Reich* v. *Compton*, 57 F.3d 270, 286-87 (1995) (§ 1106(a)(1)(D) transaction). And the Fourth Circuit's decision, which upheld a cause of action against nonfiduciary defendants for "knowing participation in an ERISA fiduciary's breach of [§ 1106]", does not focus on the party-in-interest status of the defendants, and cites approvingly to *Compton*'s holding that *non*-parties-in-interest may be held civilly liable for prohibited transactions. *See LeBlanc* v. *Cahill*, 153 F.3d 134, 151-53 (4th Cir. 1998) (§ 1106(b) transaction).

11 *See, e.g.*, 12 U.S.C. § 371c-1(b)(1)(A) ("Prohibited transactions ... A member bank or its subsidiary ... shall not purchase as fiduciary any securities ... from any affiliate...."); 15 U.S.C. § 80b-6(1) ("Prohibited transactions by investment advisers[:] It shall be unlawful for any investment adviser to ... defraud any client...."); 22 U.S.C. § 2780(b)(1)(A) ("Prohibited transactions by United States Persons ... A United States Person may not take any of the following actions: Exporting any munitions item to any country described in subsection (d) of this section.").

ity" — Congress chose to regulate fiduciaries: "A fiduciary ... shall not".

### B. The statutory context

Subchapter I, Subtitle B, Part 4 of ERISA concerns "Fiduciary Responsibility"; it specifies various duties of fiduciaries and provides that fiduciaries may be liable for their breach. Thus, § 1104 sets forth certain basic fiduciary duties: "a fiduciary shall discharge his duties with respect to a plan ..." § 1104(a)(1). Section 1109 expressly imposes civil liability on fiduciaries: "a fiduciary ... who breaches any of the ... duties imposed upon *fiduciaries* by this subchapter shall be personally liable" to make good any losses suffered by the plan "and to restore to [the] plan any profits" such fiduciary made using the plan's assets, and is "subject to such other equitable or remedial relief as the court may deem appropriate". § 1109(a) (emphasis added). Section 1105 expressly provides for liability of co-fiduciaries: "a fiduciary ... shall be liable for a breach of fiduciary responsibility of another fiduciary...." § 1105(a). But §§ 1104, 1105 and 1109 apply only to fiduciaries. No provision of ERISA imposes comparable express duties or civil liability on nonfiduciary parties-in-interest.

Section 1106 appears in Part 4, the "Fiduciary Responsibility" part of ERISA. *Cf. Hughes Aircraft* v. *Jacobson*, 119 S. Ct. 755, 760, 763 (1999) (referring to § 1106 as one of ERISA's "fiduciary provisions"); *Massachusetts Mut. Life Ins.* v. *Russell*, 473 U.S. at 143 n.10 ("ERISA establishes duties of loyalty and care for fiduciaries. With regard to loyalty, the principal provision is [§ 1106]"). And the linguistic parallel between § 1104 and § 1106 confirm what § 1106's words convey: § 1106 "simply describes another variety of fiduciary breach" (App. 7a), and does *not* impose duties upon *non*-fiduciary parties-in-interest.

It is also instructive that Congress did expressly address what class of persons should bear civil liability for partici-



pation in a fiduciary's breach of duty — and provided that only co-fiduciaries would have such liability. *See* § 1105(a); *Mertens*, 508 U.S. at 254; *see also Central Bank*, 511 U.S. at 184 ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere."). Plainly, "[i]f Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of cofiduciaries." App. 9a.

The other statutory provisions to which Ameritech points (Pet. 13-15) only undercut its position:

**Section 1108.** That § 1108(a) authorizes exemptions for "any fiduciary or transaction, or class of fiduciaries or transactions" does not indicate that it is the *transaction* that is prohibited. Rather, this indicates only that Congress chose to permit the Secretary of Labor to exempt either particular fiduciaries or particular transactions (regardless of what fiduciaries were involved). And why would §§ 1108(a) and (c) refer only to fiduciaries, *not* nonfiduciaries as well, if § 1106 imposed duties upon both fiduciaries and nonfiduciary parties-in-interest?

**Section 1132(i).** Section 1132(i) provides for *administrative* assessment of civil penalties by the Secretary of Labor in the case of a prohibited transaction "by a party in interest", which the Secretary may sue to collect under § 1132(a)(6); § 1132(i) does not authorize private causes of action. In addition, § 1132(i) by its terms "shall not apply" in the case of tax-qualified plans. Ameritech's plans are tax-qualified (Sal. C.A. App. 795), so § 1132(i) does not apply and cannot create any duty here. Moreover, as the Seventh Circuit put it, "[t]he fact that Congress saw fit to allow the Labor Department to impose such a penalty ... only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking". App. 9a.

**IRC § 4975.** Under § 4975, the IRS may impose excise taxes of up to 100% on certain parties-in-interest (including certain nonfiduciaries) who participate in nonexempt prohibited transactions with tax-qualified plans. But IRC § 4975 (ERISA § 2003) was enacted as part of *Title II* (*not* Title I) of ERISA, and § 4975 is *not* included in subchapter I of Title 29. *See* P.L. 93-406, *reprinted in* 1974 U.S.C.C.A.N. 935, 935-37. Therefore, "violations" of § 4975 by definition cannot be the predicate for a private action under § 1132(a)(3), which is limited to violations of Title I/subchapter I.[12] Furthermore, § 4975(h) merely concerns administrative coordination between the Secretaries of Labor and Treasury. Ameritech's § 4975(h) argument assumes, *inter alia*, that the *only* means by which the Secretary of Labor could ever seek a correction of *any* transaction would be by civil suit under § 1132(a)(5) against a nonfiduciary party-in-interest. Yet some prohibited transactions do not involve receipt of plan assets by a nonfiduciary (*e.g.* § 4975(c)(1) (E) and (F)), and even where a nonfiduciary is involved the Secretary of Labor could seek correction *administratively* through use of the threat of IRS assessment of excise taxes. In sum, Congress' choice to employ in its enforcement scheme the spectre of excise taxes under § 4975 on certain parties-in-interest only highlights the absence of a provision imposing civil liability upon parties-in-interest.

### C. The legislative history

Congress specifically focused on whether there should be a private right of action against nonfiduciary parties-in-interest who participate in prohibited transactions and decided that

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[12] 29 U.S.C. § 1132(a)(3), as codified, refers to violations of "any provision of this subchapter", meaning subchapter I, "Protection of Employee Benefit Rights" (which is Title I of ERISA as enacted, *see* P.L. 93-406, *reprinted in* 1974 U.S.C.C.A.N. 935-36, 939); ERISA § 502(a)(3), as enacted, refers to violations of "any provisions of this title" (again referring to ERISA Title I, *see id., reprinted in* 1974 U.S.C.C.A.N. at 935-36, 1011).



there should *not*. The House bill limited liability to fiduciaries. *See* RA23-26. By contrast, the Senate bill would have imposed civil liability on parties-in-interest for damages and disgorgement of profits (providing that "[a]ny party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies" "shall be personally liable" to make good any losses to the fund and "to pay to the fund any profits realized by him from such transaction"), and authorized civil actions "against *any person* who has transferred or *received* any of the assets of a plan or fund in violation of the fiduciary requirements" of the Act. RA21-22 (emphasis added).

The Conference Committee staff recommended that the conferees "adopt the approach of the House bill and *not provide civil liability for parties-in-interest*". RA27 (emphasis added); *see also* House Conference Report No. 93-1280, *reprinted in* 1974 U.S.C.C.A.N. 5038, 5107; App. 12a. Accordingly, under the conference agreement enacted into law, the "labor provisions" (Title I) "provide general standards of conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' which *plan fiduciaries* are not to engage in". *Id.* at 5076 (emphasis added). Also, under the "labor provisions" "a fiduciary who breaches the fiduciary requirements" is to be "personally liable" for any losses, or for disgorgement of profits made using plan assets, whereas a "party-in-interest" is potentially subject *only* to an administrative penalty or excise tax. *See id.* at 5100-01; *see also id.* at 5171, 5188.

Ameritech argues that the Seventh Circuit "ignored" legislative history showing that the words "other appropriate equitable relief" were inserted into the final version of § 1132(a)(3). Pet. 18-19. But it makes no sense to conclude that, although the Conferees adopted the House approach and omitted the express civil liability provisions of the Senate bill, still Congress intended, by insertion of the words "other

appropriate equitable relief" in § 1132(a)(3), and without even comment in the legislative history, to implicitly impose civil liability on nonfiduciary parties-in-interest. And any suggestion that the language of § 1132(a)(3) was intended to expand the scope of prohibited-transaction liability would contradict Ameritech's own position in the Court of Appeals that whether a private cause of action exists "depends entirely on the meaning of § 1106(a)". *See* p. 19, *supra*.

### D. This Court's precedents

The Seventh Circuit's decision follows naturally from this Court's decisions in *Mertens* v. *Hewitt* and *Lockheed* v. *Spink*. *Mertens* makes clear that § 1132(a)(3) should not be read as creating a private right of action against a nonfiduciary that participates in a fiduciary's breach of duty because ERISA does not "*affirmatively authorize[ ]*" such a suit. *Id.* at 253-55 & n.5 (emphasis added). As this Court explained the following year in *Central Bank*: "While plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable *duty* [is] set forth in ERISA". 511 U.S. at 175 (emphasis added).

Further, *Mertens* expressly sets forth (i) that ERISA is "a 'comprehensive and reticulated statute,' the product of a decade of congressional study" (*id.* at 251); (ii) that provisions of subchapter I of ERISA that assign duties to fiduciaries, and that make fiduciaries liable for breach of those duties, by their terms apply only to fiduciaries — there are no equivalent provisions directed to nonfiduciaries (*id.* at 251-53); and (iii) that § 1132(a)(3) — one of "ERISA's 'six carefully integrated civil enforcement provisions'" (*id.* at 252) — should not be read to apply to nonfiduciaries in the absence of "explicit[ ]" provisions in subchapter I imposing duties and liabilities on such nonfiduciaries. *Id.* at 253-55 & n.5 (emphasis added).

The Seventh Circuit correctly read in its proper context language in *Mertens* on which Ameritech relies. *See* Pet. 17-18.



*Mertens*' statement that "professional service providers ... must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975" (508 U.S. at 262) does *not* refer to civil liability. Rather, "disgorge assets and profits" refers to the "correction" of a prohibited transaction required to avert a 100% administrative penalty or excise tax (under § 4975(b)), and the "related civil penalties" or "excise taxes" refers to the 5% penalty or the excise tax under § 4975(a) to which the party-in-interest could still be subject. In other words, the Secretary of Labor or IRS can seek to force certain parties-in-interest to correct prohibited transactions "at peril of a ... penalty". *See* App. 9a-10a.

And *Mertens*' "parenthetical phrase 'assuming nonfiduciaries can be sued under [§ 1132(a)(3)]' was stating a big assumption — an assumption Justice Scalia had previously made clear that he and a majority of the Court were unwilling to make." App. 10a. Furthermore, *Mertens*' statement that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries" (508 U.S. at 253-54 & n.4) does not address the issue here: whether a nonfiduciary party-in-interest who enters into a prohibited transaction violates § 1106(a) and may be held civilly liable in a private suit. Even if ERISA "can be read" — in light of § 1132(i) or 26 U.S.C. § 4975 — "as imposing obligations upon nonfiduciaries", that does not mean that *§ 1106(a)* imposes any such obligation or that ERISA "affirmatively authorizes" (*id.* at 253-55 & n.5) *private actions* to impose *civil liabilities* upon nonfiduciaries — as opposed to the authorizations in §§ 1132(a)(6) and (i) and § 4975 for administrative penalties, suits to collect such penalties or excise taxes.

Moreover, subsequent to *Mertens*, this Court observed in *Spink* that: (1) these statements in *Mertens* "were in any event dicta"; and (2) even "[i]nsofar as [these statements] apply to [§ 1106(a)]" — which "was not at issue" in *Mertens* — these

statements "suggest liability for parties in interest *only* when a *violation* of [§ 1106(a)] has been established — which ... *requires* a showing that a *fiduciary caused* the plan to engage in the transaction in question". 517 U.S. at 889 n.3 (emphasis added).

In sum, *Mertens* makes clear that "where ERISA does not expressly impose a duty, there can be no cause of action". App. 8a. The Seventh Circuit correctly applied that principle in declining to infer a private cause of action here, since, "by its plain terms", § 1106 does not regulate nonfiduciary conduct, and "imposes no explicit duty on parties in interest". App. 7a; *see also* App. 12a-13a.

This Court in *Spink* likewise declined to impose nonfiduciary liability under § 1106. *Spink* declined to endorse the cause of action against the party-in-interest that the Ninth Circuit had articulated, and held that a prerequisite to any § 1106 claim is a showing that a fiduciary caused the plan to engage in the alleged prohibited transaction: "Unless a plaintiff can make that showing, *there can be no violation of [§ 1106(a)(1)] to warrant relief under the enforcement provisions*". 517 U.S. at 888-89 (emphasis added). *Spink* underscores that "the *only* transactions rendered *impermissible* by [§ 1106(a)] are transactions *caused by fiduciaries*" and that § 1106 "prohibits *fiduciaries* ...", "regulates the conduct of plan *fiduciaries*". *Spink*, 517 U.S. at 887-89 & n.3, 893 (emphasis added). Although *Spink* stated that the Ninth Circuit was "not necessarily wrong" in recognizing a cause of action against a nonfiduciary party-in-interest (517 U.S. at 889 n.3), "'not necessarily wrong' does not mean 'right'", as the Seventh Circuit observed. App. 10a.[13]

[13] Two other ERISA decisions Ameritech relies on are inapposite. *Varity* v. *Howe*, 516 U.S. 489 (1996), involved the entirely different issue of who can sue as a *plaintiff* under § 1132(a)(3). The *Varity* defendant was a fiduciary sued for violating § 1104(a), and *Varity* did *not* address whether nonfiduciary defendants can be sued under § 1132(a)(3). *Commissioner* v. *Keystone*, 508 U.S. 152, 160 (1993), *was a tax case under IRC § 4975*, and did *not* discuss which parties have duties under § 1106 that give rise to civil liability. As discussed above, the existence of § 4975 only highlights the congressional choice not to impose civil liability upon parties-in-interest. *See* p. 24, *supra*. The Court's statement that "Congress' goal was to bar categorically a transaction that was likely to injure the pension plan" indicates only that § 1106(a)(1)(A) applies to all property transfers by plan sponsors to plans that satisfy a funding obligation, not merely to transfers of property encumbered by debt, as the Tax Court and Fifth Circuit had held. *See* 508 U.S. at 156-57, 160-61.



## CONCLUSION

The Petition for Writ of *Certiorari* should be denied.

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Respectfully submitted,

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TITLE 29. LABOR
CHAPTER 18—EMPLOYEE RETIREMENT
INCOME SECURITY PROGRAM
SUBCHAPTER I—PROTECTION OF EMPLOYEE
BENEFIT RIGHTS
SUBTITLE B—REGULATORY PROVISIONS
PART 4—FIDUCIARY RESPONSIBILITY

**§ 1104. Fiduciary duties**

**(a) Prudent man standard of care**

**(1)** Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

**(A)** for the exclusive purpose of:

**(i)** providing benefits to participants and their beneficiaries; and

**(ii)** defraying reasonable expenses of administering the plan;

**(B)** with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

**(C)** by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

**(D)** in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 1107(d)(4) and (5) of this title).

* * *

**§ 1105. Liability for breach of co-fiduciary**

**(a) Circumstances giving rise to liability**

In addition to any liability which he may have under any other provisions of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 1104(a)(1) of this title in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

**(b) Assets held by two or more trustees**

(1) Except as otherwise provided in subsection (d) of this section and in section 1103(a)(1) and (2) of this title, if the assets of a plan are held by two or more trustees –

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and



(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) of this section or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is a trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 1103(a)(1) of this title.

**(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities**

(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any

person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that—

(A) the named fiduciary violated section 1104(a)(1) of this title—

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a) of this section.

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 1102(c)(3) of this title.

**(d) Investment managers**

(1) If an investment manager or managers have been appointed under section 1102(c)(3) of this title, then, notwithstanding subsections (a)(2) and (3) and subsection (b) of this section, no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.



**§ 1106. Prohibited transactions**

**(a) Transactions between plan and party in interest**

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

**(b) Transactions between plan and fiduciary**

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the

interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

**(c) Transfer of real or personal property to plan by party in interest**

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

**§ 1108. Exemptions from prohibited transactions**

**(a) Grant of exemptions**

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and



(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

**(b) Enumeration of transactions exempted from section 1106 prohibitions**

The prohibitions provided in section 1106 of this title shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis, (B) are not made available to highly compensated employees (within the meaning of section 414(q) of Title 26) in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of Title 26.

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the estab-

lishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 1107(d)(6) of this title), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of qualifying employer securities (as defined in section 1107(d)(5) of this title).

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).



(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company.[1] or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 1344 of this title (relating to allocation of assets).

(10) Any transaction required or permitted under part 1 of subtitle E of subchapter III of this chapter.

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 1411 of this title.

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1 So in original. The period probably should be a comma.



(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if—

(A) the requirements of paragraphs (1) and (2) of subsection (e) of this section are met with respect to such stock,

(B) on the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 1107(d)(5) of this title as then in effect), and

(C) such stock does not constitute a qualifying employer security (as defined in section 1107(d)(5) of this title as in effect at the time of the sale).

(13) Any transfer in a taxable year beginning before January 1, 2001, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of Title 26 (as in effect on January 1, 1995).

**(c) Fiduciary benefits and compensation not prohibited by section 1106**

Nothing in section 1106 of this title shall be construed to prohibit any fiduciary from—

(1) receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are par-

ticipants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan, except for reimbursement of expenses properly and actually incurred; or

(3) serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

* * *

**§ 1109. Liability for breach of fiduciary duty**

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.



TITLE 29. LABOR
CHAPTER 18— EMPLOYEE RETIREMENT INCOME SECURITY PROGRAM
SUBCHAPTER I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
SUBTITLE B—REGULATORY PROVISIONS
PART 5—ADMINISTRATION AND ENFORCEMENT

**§ 1132. Civil enforcement**

**(a) Persons empowered to bring a civil action**

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to

obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

**(6)** by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (*l*) of this section;

* * *

**(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions**

**(1)** In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

**(A)** requested by the Secretary of the Treasury, or

**(B)** one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

**(2)** The Secretary shall not initiate an action to enforce section 1145 of this title.

**(3)** The Secretary is not authorized to enforce under this part any requirement of part 7 against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 1191(a)(1) of this title). Nothing in this paragraph shall affect the authority of the Secretary to issue regulations to carry out such part.



**(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form**

**(1)** Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

**(2)** The Secretary may assess a civil penalty against any plan administrator of up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 1021(b)(4) of this title. For purposes of this paragraph, an annual report that has been rejected under section 1024(a)(4) of this title for failure to provide material information shall not be treated as having been filed with the Secretary.

**(3)** Any employer maintaining a plan who fails to meet the notice requirement of section 1021(d) of this title with respect to any participant or beneficiary or who fails to meet the requirements of section 1021(e)(2) of this title with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up

to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 1021(f)(1) of this title.

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 1021(g) of this title.

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 1024(a)(6) of this title, the plan administrator fails to furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1320b-14(c)(8) of Title 42.

* * *

**(h) Service upon Secretary of Labor and Secretary of the Treasury**

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any



action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

**(i) Administrative assessment of civil penalty**

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of Title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

* * *

**(l) Civil penalties on violations by fiduciaries**

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from

a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of Title 26.

**(m) Penalty for improper distribution**

In the case of a distribution to a pension plan participant or beneficiary in violation of section 1056(e) of this title by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each such distribution.



**S. 1179, 93d Cong., 1st Sess. § 501(c)(3), (d)(17) (1973) (not enacted)**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 1, at 780, 945, 949, 950, 955-56 (1976) (also included at Sal. C.A. App. 131, 132, 136, 137, 142-43)

**TITLE V—FIDUCIARY STANDARDS**

**Part A—FIDUCIARY STANDARDS FOR PLAN OFFICERS AND EMPLOYEES**

*SEC. 501 QUALIFICATIONS AND RESPONSIBILITIES OF INDIVIDUALS*

* * *

*(c) FIDUCIARY RESPONSIBILITIES.—With respect to any fund established under an employee benefit plan to which this section applies, any person serving as a fiduciary—*

* * *

*(3) shall not participate in any transaction which is or would be a prohibited transaction under section 4973 of the Internal Revenue Code of 1954 if such section applied to the fund.*

* * *

*(d) CIVIL ACTIONS.—*

* * *

*(17) Any party in interest who participates in a transaction described in subsection (c)(3) knowingly, or with reason to*

*know that the transaction was a transaction to which that subsection applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction. For purposes of this paragraph, the term "party in interest" means a person described in section 4973(e)(1) of the International Revenue Code of 1954.*



**H.R. 2, 93d Cong., 2d Sess. §§ 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) (not enacted)**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3772, 3780, 3816-17 (1976) (also included at Sal. C.A. App. 166, 167, 175, 178-79)

*FIDUCIARY STANDARDS*

*SEC. 15.*

* * *

*(i) Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.*

* * *

*SEC. 693. ACTIONS TO REDRESS OR RESTRAIN VIOLATIONS OF FIDUCIARY DUTY.*

*Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary who has failed to carry out his duties and the removal of any person who is serving in violation of the requirements of section 15(h) of the Welfare and Pension Plans Disclosure Act or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements of the Welfare and Pension Plans Disclosure Act or in violation of the document or documents governing the establishment or operation of the fund, may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pen-*

*sion Plans Disclosure Act in any court of competent jurisdiction, State or Federal, or the United States District Court for the District of Columbia, without respect to the amount in controversy and without regard to the citizenship of the parties. Where such action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found. Such actions may also be brought by a participant or beneficiary as a representative party on behalf of all participants or beneficiaries similarly situated. In all civil actions authorized by this Act or the Welfare and Pension Plans Disclosure Act, attorneys appointed by the Secretary shall represent the Secretary except as provided in section 518(a) of title 28, United States Code (relating to litigation before the Supreme Court of the United States).*



**H.R. 2, 93d Cong., 2d Sess. §§ 111(b), (d), (e), 503(e)**
**(as passed by the House on Feb. 28, 1974)**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3897, 3947, 3950-51, 3953-55, 4044, 4047 (1976) (also included at Sal. C.A. App. 150, 152, 155-56, 158-160, 162, 165)[1]

**FIDUCIARY RESPONSIBILITY**

SEC. 111.

* * *

(b) (1) A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) For the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

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[1] Respondents' Note: On March 6, 1994, the Senate ordered that there be printed additional copies of H.R. 2 as it passed the House of Representatives on February 28, 1974. It is this version of H.R. 2 that was reprinted in the *Legislative History of the Employee Retirement Income Security Act of 1974*. *See id.* at 3898. Thus, the printed version of H.R. 2 as passed by the House bears the caption: "IN THE SENATE OF THE UNITED STATES, March 6, 1974, ordered printed as passed by the House, by unanimous consent." *Id.* For a summary of the sequence in which these bills were introduced and/or considered, see 120 Cong. Rec. 8851 (1974).

(C) by diversifying the investments so as to minimize the risk of large losses unless under the circumstances it is prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as is consistent with this title.

(2) Except as permitted under subsection (a)(2) of this section, a fiduciary with respect to a plan shall not—

(A) deal with the assets of the plan for his own account,

(B) in his individual or any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries,

(C) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan,

(D) permit the transfer of any property of the plan to or its use by any person known to be a party in interest, except in return for no less than adequate consideration, or

(E) permit the acquisition of any property or services from any person known to be a party in interest, except in exchange for no more than adequate consideration.

* * *

(d) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the fund resulting from each breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the fund by the fiduciary and shall be subject



to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 113 of this Act.

(e) All assets of any employee benefit plan (other than any contract for the payment of annuities which is guaranteed by an insurance company and not issued to a trustee of the plan) shall be held in trust by one or more trustees. Such trustee or trustees shall either be named in the trust instrument or appointed by the administrator or administrators, and, upon acceptance of their appointment, shall have exclusive authority and discretion to manage, and exclusive control of, the assets of the plan (subject to proper directions of the administrator which are made under the terms of the plan and which are not contrary to this title and except to the extent that authority to mange, acquire, or dispose of assets of the plan is delegated to one or more investment managers). If the assets of a plan are held by two or more trustees—

(1) each shall use reasonable care to prevent a cotrustee from committing a breach, notwithstanding language to the contrary in the trust agreement; and

(2) they shall jointly manage and control the assets of the trust, except that nothing in this paragraph (2) shall preclude any agreement authorized by the trust instrument allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this paragraph (2) either individually or as a trustee for any loss resulting to the fund arising from the acts or omissions to act on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated, unless the trustee to whom the responsibilities, obligations, or duties were not allocated participated knowingly in the activities constituting a breach of the

specific responsibilities, obligations, or duties allocated to any other trustee.

* * *

**ENFORCEMENT**

SEC. 503.

* * *

(e) Civil actions under this title may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (b) of this section, or

(B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 111(d); or

(3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.



**Summary of Differences Between the Senate Version and the House Version of H.R. 2–To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93d Cong., 2d Sess. (1974)**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 5249, 5259 (1976) (also included at Sal. C.A. App. 180, 181)

*9. Civil Liability*

*House bill.—*

(1) Fiduciaries who breach any of their obligations under the bill are to be personally liable to the plan for losses resulting from the breach and for profits made through the use of plan assets, and are to be subject to other appropriate equitable relief, including removal.

(2) Fiduciaries are not to be liable for any breach committed before they became fiduciaries or after they cease to be fiduciaries.

*Senate amendment.*—This provision is included only in the Labor Act amendment.

(1), (2) Substantially the same as the House bill.

(3) Additionally, parties-in-interest who knowingly participate in a prohibited transaction, or had reason to know it was a prohibited transaction, are to be personally liable for losses sustained by the plan or for profits they realized from the transaction.

*Staff comment.—*

(1), (2) Substantially the same in both bills.

(3) The conferees may wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest.[1]

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[1] Not all the staff agree with this suggestion.

(5)

No. 99-579

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IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## REPLY BRIEF FOR PETITIONERS

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December 1999

14pp

## AMENDMENT TO RULE 29.6 STATEMENT

Petitioner Ameritech Corporation recently became a wholly-owned subsidiary of SBC Communications Inc., a publicly-traded corporation. In all other respects, the Rule 29.6 statement filed with the Petition for a Writ of Certiorari remains current. *See* Pet. ii.

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## REPLY BRIEF FOR PETITIONERS

Respondents Salomon Brothers Inc and Salomon Brothers Realty Corp. ("Salomon") acknowledge the existence of a square circuit conflict on the question presented for review. Br. in Opp. 1. Salomon does not dispute that this case presents the question on which the circuits are divided. *See* Pet. App. 13a n.1 ("[T]his opinion creates a circuit split."). Nor does Salomon dispute that the question is an important one that merits the attention of this Court. *See generally Commissioner of Internal Revenue v. Keystone Consolidated Industries, Inc.*, 508 U.S. 152, 160 (1993) ("Congress's goal was to bar categorically a transaction that was likely to injure the pension plan.").

There are strong arguments in favor of resolving the circuit split now rather than later. While the split persists, non-fiduciary parties in interest that engage in prohibited transactions will be subject to suit in some areas of the country, but not in others. The situation created by the Seventh Circuit's decision is unfair to both plaintiffs and defendants, and creates serious practical difficulties for employee benefit plans with nationwide operations. The issue has been thoroughly explored in numerous lower court decisions, *see* Pet. 11-16, and twice addressed by this Court in dicta, *see Mertens v. Hewitt Assocs.*, 508 U.S. 248, 253-54 & n.4, 262 (1993); *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996). Several entities that support Salomon's position on the merits have filed a brief as *amici curiae* in support of the Petition, explaining that "[t]his Court's intervention is urgently needed" to resolve the circuit conflict. *See* Brief of The American Council of Life Insurance, *et al.* 8.

In short, this case clearly presents an important question on which the circuits are split, and there is no reason to delay resolution of the circuit split. The petition should be granted.

### 1. This Case Is An Appropriate Vehicle For Resolving The Circuit Split.

Salomon contends (Br. in Opp. 5-14) that this case is not a suitable vehicle for resolving the circuit split. That is not so.

### a. There Is No Reason To Delay Resolving The Circuit Split In Order To Wait For A Case Presenting An Issue On Which There Is No Circuit Split.

Salomon contends (Br. in Opp. 5-10) that the Court should delay resolution of the circuit split to await a case presenting a question that has not split the circuits, namely, whether a non-fiduciary party in interest may be held liable for assisting a fiduciary in violating the fiduciary's obligations under ERISA. In Salomon's view, the Court should await a case presenting this "participation-in-fiduciary-breach" theory of liability because that theory "may be the only even potentially viable grounds for imposing liability on a nonfiduciary party-in-interest that enters into a § 1106 prohibited transaction." Br. in Opp. 8.

Salomon's argument assumes an answer to the question on which the circuits are divided. Six courts of appeals have held that a claim against a non-fiduciary party in interest that engages in a prohibited transaction is not only "potentially viable," but is *actually* viable. See Pet. 9-10. In addition, this Court has twice addressed in dicta claims against non-fiduciary parties in interest, and has recognized the potential viability of such claims.[1]

In contrast, no court of appeals has held that a non-fiduciary party in interest may be sued under ERISA for assisting a fiduciary in breaching the fiduciary's obligations, and this Court has

[1] *See Mertens*, 508 U.S. at 253-54 & n.4, 262; *Lockheed*, 517 U.S. at 889 n.3. Salomon asserts (Br. in Opp. 8) that a claim against a non-fiduciary party in interest that engages in a prohibited transaction is not viable after *Lockheed*. But *Lockheed*'s footnote 3 reconciles the holding in that case with dicta in *Mertens* suggesting that ERISA § 406(a), 29 U.S.C. § 1106(a), imposes obligations on non-fiduciary parties in interest. In addition, at least two courts of appeals have held that *Lockheed* does not preclude claims against non-fiduciary parties in interest. *LeBlanc v. Cahill*, 153 F.2d 134, 152 (4th Cir. 1998); *Herman v. South Carolina National Bank*, 140 F.3d 1413, 1422 n.14 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).



suggested in dicta that such a claim is not available. *See Mertens*, 508 U.S. at 253-55 & n.5. A question that has created no disagreement among the courts of appeals generally does not merit review by this Court. And the Court typically does not defer resolution of important circuit conflicts until it can take up other issues that have not divided the courts of appeals.

Having asserted that the Court should await a case that presents both a "direct" liability theory and a "participation-in-fiduciary-breach" theory, Salomon then argues that a "direct" theory ultimately is no different from a "participation" theory. *See* Br. in Opp. 9 (arguing that, if the fiduciary caused the violation, it follows that the non-fiduciary party in interest assisted the fiduciary in breaching the fiduciary's obligations). Again, this is an argument on the merits rather than an argument about whether review should be granted. If Salomon is correct, moreover, its argument that the Court should await a case presenting a "participation" theory of liability makes no sense, because a "direct" theory and a "participation" theory are really one and the same.[2]

### b. There Is No Reason To Prolong The Circuit Split Pending Final Resolution Of Ameritech's Other Claims.

Salomon contends (Br. in Opp. 10-11) that the Court should deny review because the Seventh Circuit's decision, while definitively rejecting Petitioner Ameritech's claim that a non-fiduciary party in interest that engages in a prohibited transaction

[2] The question presented by the Petition ("Whether a non-fiduciary party in interest . . . that engages in a prohibited transaction . . . with the plan can be sued under ERISA . . . for 'appropriate equitable relief,' including restitution." Pet. i.), fairly includes the question whether a non-fiduciary party in interest may be sued because, by engaging in a prohibited transaction, it assists a fiduciary in violating the fiduciary's own obligations under ERISA. That issue was also fairly included within the question framed by Salomon and certified to the Seventh Circuit: "Does 29 U.S.C. § 1132(a)(3) affirmatively authorize a private right of action against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited by 29 U.S.C. § 1106(a)." Pet. App. 63a.

can be sued under ERISA, does not foreclose the possibility that Salomon might ultimately be held liable as a fiduciary under ERISA or under state law.[3]

The fact that the court of appeals' decision does not finally resolve Ameritech's other claims does not make this case an unsuitable vehicle for resolving the circuit split. This Court will grant review of a nonfinal decision where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.18, at 196 (7th ed. 1993) (citing cases); *see also id.* at 197 (citing examples of cases in which "[c]ertiorari was . . . issued to review a nonfinal judgment where there was a conflict on a question of law . . . which would justify review of a final decree or judgment").

This case easily meets that standard. It presents an important and clear-cut issue of law on which the circuits are cleanly divided. The issue is fundamental to the further conduct of the case, and otherwise qualifies as a basis for certiorari.[4] There are strong reasons favoring an early resolution of the circuit conflict. The Seventh Circuit's decision is a final rejection of Petitioners' claim, and further proceedings on Petitioners' remaining claims are quite unlikely to shed any additional useful light on the question presented for review. Accordingly, the remaining claims do not justify delaying resolution of the circuit conflict. *See, e.g.*, *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199 (1996) (granting review after the court of appeals held, on certification under 28 U.S.C. § 1292(b), that state-law remedies applied in a maritime wrongful death case); *Wilson v. Garcia*, 471 U.S. 261, 264-66 (1985) (granting review to resolve a circuit conflict after the court of appeals held, on certification under § 1292(b), that a

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[3] These additional claims have already been rejected by the district court, and Salomon takes the position that Ameritech cannot appeal any claims that Salomon is liable as a fiduciary. Br. in Opp. 10 n.4.

[4] When Salomon sought certification under 28 U.S.C. § 1292(b), it asserted, and the district court agreed, that the issue is a "controlling" question of "law." *See* Pet. App. 63a.



claim under 42 U.S.C. § 1983 was not time-barred); *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 643-44 (1980) (*per curiam*) (granting review after court of appeals held, on certification under § 1292(b), that challenged practice was not *per se* illegal).

**c. There Is Ample Evidence In The Record That Salomon Knew Or Should Have Known That It Was Engaging In Prohibited Transactions.**

There is no merit to Salomon's argument (Br. in Opp. 11-14) that review should be denied because, assuming that a non-fiduciary party in interest may be sued under ERISA for engaging in a prohibited transaction, the plaintiff must prove that the defendant "knew at the time of the transaction that the fiduciary who caused the plan to engage in the transaction was violating § 1106(a)." Br. in Opp. 11. According to Salomon (*id.* at 12), such knowledge "must" be an element of a claim under § 406 of ERISA, 29 U.S.C. § 1106, and Ameritech failed to present any admissible evidence that Salomon knew at the time of the transaction that a fiduciary was violating § 406.

There are several flaws in this argument. First, Salomon is incorrect in asserting (Br. in Opp. 12) that actual knowledge of a violation "must be an element of any § 1106(a) claim against a nonfiduciary party-in-interest." By its terms, § 1106(a) bars transactions if the fiduciary "knows *or should know*" that it is dealing with a party in interest. ERISA § 406(a), 29 U.S.C. § 1106(a) (emphasis added). That is not, as Salomon claims (Br. in Opp. 12) an "express scienter standard" (*i.e.*, a requirement that the defendant knowingly violated the law): "'Knew' and 'did not know but should have known' are different. One refers to actual and the other to imputed knowledge." *Contract Courier Services, Inc. v. Research and Special Programs Administration, United States Department of Transportation*, 924 F.2d 112, 113-14 (7th Cir. 1991). Of the half dozen courts of appeals that have held that a non-fiduciary party in interest may be sued under ERISA for engaging in a prohibited transaction, not one has held that the plaintiff must show that the defendant knew the transaction violated § 406. Indeed, the only court of appeals to have expressly addressed the issue held (in the context of a party in interest who did not pay value for the plan assets received) that liability is *not*

limited "to parties in interest who *knowingly* receive Plan assets to which they are not entitled." *See Landwehr v. DuPree*, 72 F.3d 726, 734 (9th Cir. 1995).[5]

Second, there is ample evidence in this record that Salomon satisfied any applicable "knowledge" requirement. As the district court stated, "knowledge that [Salomon] was a service provider to an employee pension benefit plan and was engaging in a transfer of property with the plan or its fiduciary is enough." Pet. App. 42a. Salomon knew that: (1) it provided services to the Ameritech Pension Trust; (2) it retained an interest in three of the four "Fee Agreements" that it sold to the Pension Trust; (3) it agreed to provide information on an ongoing basis to the Pension Trust's investment manager, NISA; (4) NISA was an ERISA fiduciary; and (5) NISA was purchasing the Fee Agreements on behalf of the Pension Trust. *See* C.A. Supp. App. 95-104, 108-09, 250, 381-84, 481-86. In addition, there is no dispute that NISA was an ERISA fiduciary and caused the plans to enter into the prohibited transactions. Thus, Salomon is not entitled to summary judgment on an alternative ground.[6]

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[5] Salomon cites ERISA § 405, 29 U.S.C. § 1105, which provides that co-fiduciaries who participate in transactions caused by another fiduciary may be liable if they "know" that an act or omission by the other fiduciary is a breach. ERISA § 405(a)(1), 29 U.S.C. § 1105(a)(1). But liability under § 406 is not the same as liability under § 405, and the prohibitions of § 405 are "[i]n addition to any liability . . . under any other provision of this part." ERISA § 405(a), 29 U.S.C. § 1105(a). Moreover, courts of appeals have recognized that a non-fiduciary party in interest that engages in a prohibited transaction is liable for its *own* wrongdoing. *See, e.g., Landwehr*, 72 F.3d at 734. This undermines Salomon's attempted analogy to co-fiduciary liability under § 405, as well as its assertion that the relevant knowledge (if any is required) is knowledge of a fiduciary's violation, rather than knowledge of the defendant's own violation.

[6] Salomon suggests (Br. in Opp. 11) that the Court will be required to define the elements of a claim against non-fiduciary parties in interest if it grants review and holds that such a claim is available under ERISA. That is not so. "Only the questions set out in the petition, or fairly included therein, will be considered by the Court." S. Ct. R. 14.1(a); *see also Yee*

(...footnote continued)



**2. There Is No Reason To Prolong The Circuit Split To Await Further Consideration Of The Issue By The Courts Of Appeals.**

Salomon contends (Br. in Opp. 14-16) that it is appropriate to delay resolution of the circuit split to await further consideration of the issue by the courts of appeals. There is no basis for that suggestion. The Seventh Circuit's decision creates a clear circuit split on an important issue that will not be resolved without this Court's intervention. The Seventh Circuit polled its members, and declined to take the case *en banc* despite its express recognition that the panel's decision creates a circuit split. *See* Pet. App. 13a n.1. The six other circuits that have already decided the issue are unlikely to vote to reconsider it *en banc*; certainly all six will not do so.

Salomon's assertion (Br. in Opp. 16) that there is no "urgency" about resolving the split is flatly incorrect. *See Amici* Br. 8 (review is "urgently needed"). As long as the circuit split persists, plaintiffs in some circuits will be able to sue non-fiduciary parties in interest that engage in prohibited transactions under ERISA, while plaintiffs in the Seventh Circuit will not. This disparity on a basic and important issue of ERISA law is unfair to all parties concerned, and creates severe practical problems for plans with nationwide operations. Although the Court has denied certiorari in prior cases (Br. in Opp. 16), those cases came to the Court at a time when there was no circuit split. *See Fickling v. Herman*, 119 S. Ct. 1030 (1999); *Stangl v. Reich*, 519 U.S. 807 (1996).

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(. . . continued)

*v. City of Escondido*, 503 U.S. 519, 535 (1992). The "knowledge" issue was not reached by the court of appeals, and has created no conflict in the circuits. In those circumstances, the Court may exercise its discretion to allow the lower courts to consider the issue in the first instance. *Dandridge v. Williams*, 397 U.S. 471, 476 n.6 (1970) ("[W]hen the court from which a case comes has expressed no views on a controlling question, it may be appropriate to remand the case rather than deal with the merits of that question in this Court."); *see also United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994) (declining to decide scienter issue not reached by the court of appeals).

The issue presented by this case has been extensively explored in numerous lower court decisions, and "further review . . . is unlikely to provide greater insight into the issue." *Amici* Br. 9. Contrary to Salomon's contention, there is no need for this Court to await additional court of appeals' opinions that specifically discuss the significance of a "recommendation" by congressional "staff." Br. in Opp. 15. Similarly, the Court need not answer the question whether knowledge is an element of an action against a non-fiduciary party in interest, let alone determine the level of knowledge that is required. And Salomon's suggestion (*id.*) that the Court should refuse to resolve the circuit split until the courts of appeals that recognize a cause of action say more about the "precise[] . . . operative theory" of liability makes little sense. Six courts of appeals have held that non-fiduciary parties in interest *are* liable, and have given their reasons for doing so. Unless those courts vote to reconsider the issue *en banc*, there is no reason for them to say more.

### 3. The Question Presented Is Important And Warrants This Court's Attention.

Salomon attempts to deflect the Court's attention from the importance of the legal issue presented by focusing on particular features of this case, such as the fact that the Ameritech plans are defined benefit plans (under which Ameritech is obligated to pay fixed benefits regardless of the plans' investment performance), and the fact that Ameritech is financially able to compensate the plans for their losses. Br. in Opp. 16-17. This ignores the fact that the Seventh Circuit's holding applies to all non-fiduciary parties in interest that engage in prohibited transactions under ERISA. Many plans covered by ERISA are not defined benefit plans, and not all ERISA employers and plan fiduciaries are solvent. Moreover, even where employees will not lose benefits at the end of the day, the question remains whether victimized plans or their beneficiaries can sue parties in interest who profit from prohibited transactions seeking restitution of the ill-gotten gains.

Salomon also points to other possible remedies, including claims under ERISA against fiduciaries and co-fiduciaries, "potential[]" claims against other persons under other federal laws or state laws, and possible enforcement actions by the Department



of Labor (in some cases) or excise taxes (in other cases). Br. in Opp. 17. But these remedies may not work. Fiduciaries may be insolvent; claims under other laws may be barred under ERISA's powerful preemption provision; and the government's limited enforcement resources inevitably will prevent it from pursuing many valid claims.

Salomon asserts that whether providing a private cause of action would better promote a basic policy goal of ERISA is "legally irrelevant." Br. in Opp. 18. That is incorrect. Statutes should be construed, where the statutory language permits, to advance the basic policies sought to be promoted by a statutory scheme, and not to clash with them for no good reason. *See* Pet. 19 (citations omitted). Here, there can be no serious question that immunizing non-fiduciary parties in interest who engage in prohibited transactions from civil actions brought by ERISA plans, beneficiaries, fiduciaries, and the Department of Labor will undermine ERISA's basic policy of protecting plan assets and beneficiaries.[7]

### 4. Salomon's Arguments On The Merits Afford No Basis For Denying Review.

Finally, Salomon's extended argument on the merits (Br. in Opp. 18-28) affords no basis for denying review. Arguments on the merits, whether favoring the Seventh Circuit's position or the position adopted by every other circuit that has decided the issue, do not alter the fact that there is a square circuit conflict on an important question that calls for prompt resolution. If, as Salomon contends, the Seventh Circuit is correct on the merits, that is all the more reason to correct the law in the many other circuits that have reached a contrary conclusion. Any argument that certiorari

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[7] Salomon asserts (Br. in Opp. 17-18) that immunizing non-fiduciary parties in interest furthers the basic policies of ERISA, by ensuring that fiduciaries are held liable for all prohibited transactions. But immunizing non-fiduciary parties in interest greatly increases their economic incentives to engage in prohibited transactions. In many cases, moreover, plans and beneficiaries will not be able to recover the lost assets from another source.

should be denied because the Seventh Circuit's decision is correct on the merits is undercut by the brief of *amici* in support of the petition, who urge the Court to grant review because of the importance of the issue on which the circuits are split, even though they agree with the Seventh Circuit's decision on the merits. See *Amici* Br. 6-17.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

## BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AND WILLIAM A. FICKLING, JR., *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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21KP

## QUESTION PRESENTED

Whether private parties or the Secretary of Labor may obtain equitable relief against nonfiduciaries who allegedly benefit from a fiduciary's violation of Title I of ERISA.

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IN THE

# Supreme Court of the United States

No. 99-579

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit**

**BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AND WILLIAM A. FICKLING, JR., *et al.*, AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS**

*Amici curiae*[1] the American Council of Life Insurance ("ACLI") and William A. Fickling, Jr., Neva L. Fickling, William A. Fickling, Claudia F. Fickling, Jane Dru Fickling, Katherine M. Wright, Katherine Darden Wright, Virginia M. Rabun, W&J Capital Company, Ltd., J&R Capital Company,

[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

Ltd., and Nationsbank of Georgia, N.A., as successor trustee under certain Fickling private trusts (the "Fickling *amici*") respectfully submit this brief in support of petitioners' request for certiorari.

## INTEREST OF AMICI CURIAE

1. *Amicus* ACLI, based in Washington D.C., is the largest trade association representing the life insurance industry in the United States, representing 493 legal reserve life insurance companies throughout the United States. Its members account for over 77% of the life insurance, 82% of the disability insurance, and 84% of the pension business among life insurance companies in the country.

The ACLI's members are service providers performing many nonfiduciary functions for employee benefit plans, including custodial and recordkeeping services, and therefore are included in the statutory definition of "party in interest" found in ERISA § 3(14), 29 U.S.C. § 1002(14). As service providers, the ACLI's members would be subject to equitable restitution claims regardless of fault if suits against nonfiduciary parties in interest were permitted under ERISA Section 502(a), 29 U.S.C. § 1132(a). Accordingly, the ACLI and its members have a vital interest in assuring that ERISA is interpreted consistently with its text and legislative history, and that the Court clarify the scope of civil enforcement authority granted in ERISA.

2. The Fickling *amici* are defendants in a suit in which the Secretary of Labor ("Secretary") seeks equitable relief from them on the theory that they are parties in interest who allegedly participated in "a prohibited transaction" under ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A). The Secretary alleges that *amici* violated ERISA § 406(a)(1)(A), 29 U.S.C. § 1106, when they sold Charter Medical Corporation stock to Charter's Employee Stock Ownership Plan in February, 1990.



The district court initially granted summary judgment in favor of the Fickling *amici* on the ground that ERISA does not authorize the Secretary to sue non-fiduciary "parties in interest" for their participation, knowing or otherwise, in a prohibited transaction. The Eleventh Circuit reversed, concluding that the Ficklings may be held liable under ERISA if they are found to be "parties in interest." *See Herman v. South Carolina National Bank*, 140 F.3d 1413, 1419-22 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).[2] The Seventh Circuit, in the decision below, expressly disagreed with the Eleventh Circuit's decision in *Herman*. Because the Secretary's action remains pending against the Fickling *amici* in federal district court, *amici* have a vital interest in the outcome of this case.

## STATEMENT

1. In the late 1980's respondents Salomon Brothers Inc and Salomon Brothers Realty Corp. (collectively "Salomon") provided broker-dealer services to petitioner Ameritech Pension Trust ("APT" or "Trust"), which holds assets for Ameritech Corporation's employee pension plans. National Investment Services of America, Inc. ("NISA") was the investment manager to APT and, as such, was responsible for investment decisions concerning certain of APT's assets. Pet. App. 2a.

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[2] The Eleventh Circuit decision considered Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), which governs actions brought by the Secretary, while the present case was brought by private litigants under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3). The pertinent language of Section 502(a)(5) is identical to that of Section 502(a)(3), relating to actions brought by private parties, and this Court has recognized that the two provisions must be interpreted consistently. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also, e.g., Reich v. Comptom*, 57 F.3d 270, 284 (3d Cir. 1995).

From 1987 to 1989 Salomon arranged financing for two motel chains, Motels of America, Inc. and Best Inns, Inc. In four separate transactions, those companies sold mortgage notes secured by certain motel properties to Salomon, who in turn sold the notes to institutional investors. As consideration for its services, Salomon received fees based on a percentage of any "net cash flow" generated by the motels involved, plus a percentage of appreciation in the motel properties upon maturity of the associated notes or sale of the properties. Pet. App. 2a.

Salomon subsequently offered to sell its participation interest in the motel properties to APT and, after extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motels for approximately $20 million. In the early 1990's, however, the nationwide market for hotel and motel real property collapsed and the issuers of the participation interests purchased by APT went into bankruptcy. APT suffered a considerable loss on its investment. Pet. App. 2a.

2. APT's newly appointed trustee, petitioner Harris Trust and Savings Bank, sued Salomon in 1992, alleging claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, and Illinois statutory and common law. To the extent pertinent here, the ERISA claim alleged that Salomon, a "party in interest" with respect to APT, participated in a "prohibited transaction" under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), when it sold its participation interest in the motel groups to APT.

Salomon moved for summary judgment on the ERISA claim, asserting that Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), authorizes a private cause of action only against *fiduciaries* who have participated in Section 406(a) prohibited transactions. The district court denied summary judgment, finding that nonfiduciary parties in interest may be



liable under ERISA for participating in prohibited transactions. Salomon moved for reconsideration, or in the alternative, certification for interlocutory appeal. Pet. App. 3a. The district court declined to reconsider its decision but later certified for interlocutory review, under 28 U.S.C. § 1292(b), the question whether ERISA authorizes an action "against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited in 29 U.S.C. § 1106(a)." Pet. App. 63a.

3. The court of appeals accepted the appeal and reversed. Pet App. 1a-13a. After reviewing the statutory language, legislative history, and this Court's cases, the Seventh Circuit concluded that ERISA § 502(a), 29 U.S.C. § 1132(a), does not provide for a cause of action by private litigants or the Secretary against nonfiduciary parties in interest. The Seventh Circuit explicitly recognized that its decision "creates a circuit split." *Id.* at 13a.

The court of appeals first noted that ERISA § 406, 29 U.S.C. § 1106—which precludes fiduciaries from permitting a plan to engage in certain transactions with "parties in interest"—governs only the conduct of fiduciaries. That focus, the court believed, indicates that only a fiduciary can violate Section 406. Pet. App. 7a. The court observed that Section 406 is contained within the section of ERISA addressing "Fiduciary Responsibilities." *Ibid.* The court also noted that Section 409 of ERISA, 29 U.S.C. § 1109, makes the fiduciary—and only the fiduciary—liable for breaches of the duties described in the "Fiduciary Responsibilities" part of ERISA, including those described in Section 406. *Ibid.* Because Section 502(a), 29 U.S.C. § 1132(a)(2), provides a private cause of action only to enjoin or redress "violation[s]" of ERISA, the court concluded that Section 502(a) may not be invoked against parties who are not liable under Section 409. *Ibid.*

The court of appeals further concluded that this Court's holding in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993)—

*i.e.*, that nonfiduciaries cannot be held liable even for *knowingly* participating in a fiduciary breach under Section 404 of ERISA, 29 U.S.C. § 1104—supported the court's conclusion that nonfiduciaries cannot be liable for participating in a prohibited transaction under Section 404. Pet. App. 8a. In *Mertens*, this Court reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under Section 404, no such cause of action exists. 508 U.S. at 254. The Seventh Circuit concluded the same logic applies to Section 406 since Section 406 simply describes another variety of fiduciary breach. Pet. App. 7a. While the court of appeals recognized that *Mertens* had indicated in dictum that parties in interest might be treated differently, so as to be subject to equitable relief in certain circumstances, the court concluded that subsequent pronouncements from this Court cast doubt on that *Mertens* dictum. *Id.* at 11a.

Finally, the court of appeals emphasized that, in enacting ERISA, Congress developed a detailed enforcement procedure under which civil penalties are the sole enforcement mechanism for nonfiduciary parties in interest who participate in prohibited transactions with pension plans. Pet. App. 9a. Indeed, the court noted that the legislative history of ERISA demonstrates that Congress deliberately chose *not* to give enforcement authority against nonfiduciaries to private parties or the Secretary, since Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so. *Id.* at 11a-12a.

## REASONS FOR GRANTING THE PETITION

This Court's intervention is essential to give an authoritative answer to the issue of whether an action may proceed against nonfiduciary parties in interest who allegedly participated in a prohibited transaction. Although the Seventh Circuit's decision is correct and should be affirmed, the Seventh Circuit also correctly recognized that five other circuits have



reached a contrary conclusion. Other courts of appeals have read this court's decision in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), as excepting statutory "parties in interest" from the general principle that nonfiduciaries are not liable under Sections 502(a)(3) & (a)(5) of ERISA. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d. 1027 (10th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25 (1st Cir 1994). Indeed, another court of appeals has concluded that nonfiduciaries *are* liable under ERISA if they knowingly participate in a fiduciary's breach, *whether or not* they are "parties in interest." *LeBlanc v. Cahill*, 153 F.3d 134 (4th Cir. 1998). The increasing disarray in the lower courts' approach to the liability of nonfiduciaries under Section 502(a) of ERISA clearly warrants this Court's plenary review.

### I. Review Is Warranted To Resolve The Clear Conflict Among the Circuits On The Issue Of Nonfiduciary Liability Under ERISA.

In the decision below, the Seventh Circuit recognized that ERISA governs only the conduct of fiduciaries. Pet. App. 7a-9a. Because Congress specifically considered imposing civil liability on parties in interest for participating in prohibited transactions with fiduciaries, but ultimately elected not to do so, the Seventh Circuit concluded ERISA does not provide for party-in-interest liability in such circumstances. Pet. App. 11a-12a.

By contrast, the Ninth Circuit in *Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988), construed the language of ERISA as permitting suits against nonfiduciary parties in interest. Like the Seventh Circuit, the *Nieto* court recognized that Section 406(a) of ERISA does not expressly bar parties in interest from engaging in prohibited transactions. The *Nieto* court nonetheless concluded that a suit seeking equitable relief may be brought against a party in interest who participates in a prohibited transaction, because that court believed such

suits are necessary to protect ERISA plans from the misdeeds of fiduciaries. 845 F.2d at 873-74. The *Nieto* court considered Congress' carefully developed civil penalties scheme but the court reached a conclusion directly contrary to the Seventh Circuit's holding: rather than understanding Congress' carefully considered enforcement procedure as placing the sole enforcement mechanism against nonfiduciary parties in interest with the Secretary of Treasury, the Ninth Circuit concluded that this structure contemplated suits by the Secretary of Labor (and by private parties) against nonfiduciaries because the Secretary of Labor is granted an opportunity to "correct[] the prohibited transaction" before imposing civil penalties. *Id.* at 874, n.6.

Several other courts of appeals have followed the Ninth Circuit's reasoning, but they have provided little additional insight or justification for imposing liability on nonfiduciary parties in interest. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d. 1027 (10th Cir. 1996); *Landwehr v. DuPree*, 72 F.3d 726 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25 (1st Cir 1994). Those circuits have been unwilling to depart from the view articulated by the Ninth Circuit in *Nieto* because they believe that this Court in effect endorsed that theory in *Mertens*.

Although this Court has expressly recognized that the brief passage from *Mertens* on which those courts have relied was dictum, and even though the bulk of this Court's discussion in *Mertens* is *inconsistent* with the rule adopted by these circuits, only this Court can authoritatively settle a division of authority that has been spawned, in large part, by one of this Court's decisions. This Court's intervention is urgently needed to reaffirm *Mertens*' basic teaching that the Secretary and private parties may not bring suit against nonfiduciaries. The Court will not benefit from deferring review of this issue to allow for further consideration by the lower courts, which have already fully examined the statutory language, the pertinent legislative history, and the previous decisions of this Court. Indeed, further review by the lower courts is unlikely to provide greater insight into the issue that currently divides the courts of appeals, and instead will simply subject nonfiduciaries to litigation under a theory of liability Congress clearly did not intend to create.



## II. The Seventh Circuit Correctly Concluded That Nonfiduciary Parties in Interest May Not Be Sued for "Equitable Relief" Under Title I of ERISA.

According to several courts of appeals, ERISA authorizes suits for equitable relief against a nonfiduciary party in interest who has realized a financial benefit from a prohibited transaction—regardless of fault. The Seventh Circuit properly recognized, however, that there is no support in the text or history of ERISA for the conclusion that a private litigant or the Secretary of Labor has the authority to bring a claim against nonfiduciaries, and that ERISA's carefully integrated enforcement provisions do not authorize such suits.

1. As the Seventh Circuit properly concluded, Section 502(a) "only serves to provide a private cause of action for *violations* of ERISA." Pet. App. 8a (emphasis added). A party in interest's participation in a prohibited transaction is not a "violation" of any provision of Title I. Part 4 of Title I of ERISA is entitled "Fiduciary Responsibility." Consistent with that title, Section 406 of ERISA, 29 U.S.C. § 1106(a), addresses party-in-interest transactions solely as a restriction on *fiduciary* conduct, and "therefore only a fiduciary can violate § 1106." Pet. App. 7a; *see* 29 U.S.C. § 1106(a) ("a *fiduciary* * * * shall not cause") (emphasis added). Put differently, Section 406 does not purport to bar *non*fiduciary parties in interest from entering into prohibited transactions.

That view is consistent with the fundamental rationale of this Court's decision in *Mertens*, which expressed substantial doubt that nonfiduciaries can *ever* be held liable under

ERISA for knowing participation in a fiduciary breach, even though such liability was well established under the common law. 508 U.S. at 254. The *Mertens* Court noted only "*some* common-law 'nonfiduciaries' are made subject to [a duty not to assist in a fiduciary's breach], namely those who fall within ERISA's artificial definition of 'fiduciary.'" 508 U.S. at 255 n.5. As this Court subsequently explained, "[w]hile plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable duty [is] set forth in ERISA." *Central Bank of Denver, N.A. v. First Interstate Bank*, 511 U.S. 164, 175 (1994) (internal citations to *Mertens* omitted). There can be no cause of action against nonfiduciaries for the simple reason that ERISA does not impose a *duty* on such entities.

Moreover, if, as *Mertens* and *Central Bank* indicate, there is no nonfiduciary liability even for *knowingly* participating in a fiduciary breach, it necessarily follows that there can be no nonfiduciary party in interest liability under Section 502(a) merely for participating, even innocently, in a prohibited transaction. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach, and Section 406 of ERISA, like Section 404 (which was at issue in *Mertens*), places the burden of avoiding the fiduciary breach on the *fiduciary*, where that burden traditionally has fallen. Courts that have permitted suits against nonfiduciary parties in interest have simply ignored the reasoning and logic of the decision in *Mertens*, as reaffirmed in *Central Bank*.

The circuits who impose liability on parties in interest under ERISA § 502(a) rely on a fundamental logical flaw as well. While conceding that Section 502(a) provides no cause of action against *non*fiduciaries (including parties in interest) who knowingly participate in a fiduciary breach, those courts have nonetheless mistakenly concluded that Section 502(a) authorizes suits against nonfiduciary parties in interest who participate in prohibited transactions on the theory that such



*transactions* "violate" ERISA within the meaning of Section 502(a). *See, e.g. Compton*, 57 F.3d at 284-85, 287; *Rowe*, 20 F.3d at 30-32 & n.7; *see also Landwehr*, 72 F.3d at 734. But a nonfiduciary's participation in a prohibited transaction is no more a "violation" of ERISA Title I than is a nonfiduciary's participation in any other breach of fiduciary duty. In either case, ERISA Title I (and specifically Sections 404 and 406) prohibits the *fiduciary* from engaging in the conduct at issue, but does *not* purport to proscribe the conduct of any other party. If nonfiduciaries are not liable for participating (knowingly or otherwise) in a transaction that amounts to a violation of Section 404 by the fiduciary, it follows that they cannot be liable under Title I for participating in a transaction that amounts to a violation—by the *fiduciary* alone—of Section 406 either.

Petitioners err in contending that "the *Mertens* Court went out of its way" (Pet. 17) to validate the view that ERISA provides a cause of action against nonfiduciary parties-in-interest. *Mertens* did observe in passing that "professional service providers * * * must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406." 508 U.S. at 262. That comment, however, hardly represents the considered judgment of this Court. To the contrary, this Court has since gone "out of its way" (Pet. 17) to make clear that it did *not* resolve this issue in *Mertens*. As this Court has cautioned, those statements in *Mertens* "were in any event dicta, since Section 406(a) was not at issue." *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996). Indeed, the most that this Court was willing to say in *Lockheed* for the theory that nonfiduciaries can be liable under ERISA is that such theory is "not necessarily wrong" (*ibid.*)—not exactly a ringing endorsement. As the Seventh Circuit correctly observed, "not necessarily wrong" is quite a distance from being "right." Pet. App. 11a.

Petitioners' submission also ignores this Court's repeated admonitions that it is "unwilling[] to infer causes of action in

the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254. As the Seventh Circuit recognized, *Mertens* determined that Congress did not intend to impose a civil liability on nonfiduciaries who participate in a breach of fiduciary duty because ERISA does not contain an explicit statement of nonfiduciary participation liability. "Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction." Pet. App. 9a. While petitioners strive mightily to establish inferentially that Congress somehow intended to create a cause of action that it neglected to create expressly (Pet. 13-15), their efforts cannot be reconciled with this Court's well settled approach to the interpretation of ERISA.

2. The Seventh Circuit properly recognized that ERISA's detailed enforcement procedure provides for only one method of enforcement against nonfiduciary parties in interest—civil penalties imposed by the government. Title II of ERISA addresses the treatment to be accorded parties in interest who participate in prohibited transactions involving pension plans, but it places the sole responsibility for imposing any party-in-interest liability in the hands of the Internal Revenue Service. The detailed enforcement regime for parties in interest who participate in prohibited transactions with pension plans does not provide a role for the Secretary or for private parties to obtain equitable relief from parties in interest.[3]

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[3] The single exception is ERISA § 502(i), 29 U.S.C. § 1132(i), which authorizes the Secretary to assess civil penalties against parties in interest who participate in prohibited transactions with *welfare* plans, but not for such transactions with *pension* plans. The authority to assess that penalty for non-pension plan prohibited transactions only reinforces the proposition that the IRS has the exclusive role for nonfiduciary parties in interest involved with pension plans. *Botany Worsted Mills v. United States* 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode").



Section 4975 of the Internal Revenue Code, enacted as part of Title II of ERISA, imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction [with a pension plan] (other than a fiduciary acting only as such)," and defines "disqualified person" in terms almost identical to ERISA's definition of "party in interest." *Compare* 26 U.S.C. § 4975(a) and (e)(2) with 29 U.S.C. § 1002(14). Thus, Congress provided for excise tax liability for pension plan parties in interest in the Internal Revenue Code; it provided for equitable relief by injured private parties or the Secretary against fiduciaries in Title I. "If Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly." Pet. App. 9a. Congress instead intentionally created separate and mutually exclusive enforcement mechanisms in the pension plan context. Private litigants (or the Secretary of Labor) should not be permitted to blur such clear dividing lines.

As petitioners note (Pet. 14-15), the Secretary does have a minor enforcement role with respect to parties in interest who participate in a prohibited transaction with a pension plan, but that role is clearly defined and does not include obtaining equitable relief. Section 4975(h) contemplates that the Secretary of Labor will have "a reasonable opportunity to obtain correction of the prohibited transaction or to comment on the imposition of the tax" before the IRS imposes any excise tax. But this provision merely allows the Secretary an "opportunity" to seek a correction (from the fiduciary) or make a comment on the tax; it does not carry with it the

implication that the Secretary will have a cause of action against nonfiduciary parties in interest who participated in the transaction with a pension plan.

Any reliance on Section 4975(h) as a basis for imposing liability under Section 502 is nothing more than an attempt to bring through the back door what Congress deliberately excluded from Title I of ERISA. The fact that Congress did make certain parties in interest responsible to pay the Section 4975 tax is all the more reason to believe that the absence of any language creating civil liability in ERISA Title I means that no such liability exists. The expression of one thing is the exclusion of another. *See Leatherman v. Tarrant County Narcotics Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

3. If the text and structure of ERISA left any room for doubt concerning Congress' intent to impose liability only on fiduciaries, the legislative history of ERISA would put any such uncertainty to rest. The various cases that allow the Secretary or private parties to sue parties in interest under Section 502 either ignore altogether or give short shrift to a key indication of congressional intent correctly considered and relied upon by the Seventh Circuit: "Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so." Pet. App. 12a. The Senate version of the bill that became ERISA contained an express provision requiring that parties in interest "make good" to the plan any losses resulting from their participation in prohibited transactions.[4]

[4] *See* S. 4, 93d Cong. § 15(h) (1973), *reprinted in* Senate Comm. on Labor and Pub. Welfare, 94th Cong., Legislative History of the Employee Retirement Income Security Act of 1974 ("Leg. His.")at 1450 (1976); *see also* S. 1179, 93d Cong. § 501(d)(17) (1973), Leg. Hist. at 955-56.



The House bill, by contrast, did *not* provide for the imposition of any liability for participation in prohibited transactions.[5] The conference resolved that disagreement by adopting the present system of dividing enforcement between the IRS, on the one hand, and private parties and the Secretary of Labor on the other:

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor provisions) with respect to the plan under the tax laws (title II). *This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules* * * * *

H.R. Conf. Rep. No. 93-1280 (amendment) (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5076 (emphasis added).

Senator Williams, Chairman of the Senate Committee on Labor and Public Welfare, made the point even more clearly when he introduced the Conference Report. As he explained, the compromise gave "enforcement of the fiduciary provisions primarily [to] the Secretary of Labor," who would be authorized "to bring civil actions to redress or restrain violations on the part of fiduciaries." By the same token, the IRS was given "responsibility for dealing with those who are 'disqualified persons'—similar to parties in interest defined in the labor portion of the conference substitute—with

[5] *See* H.R. Conf. Rep. No. 93-1280 (amendment) (1974), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075.

authority to impose excise taxes on" them. 1974 U.S.C.C.A.N. at 5177, 5188 (statement of Sen. Williams).

In sum, ERISA's legislative history makes clear that Congress did not inadvertently omit party-in-interest liability from the comprehensive enforcement scheme established in Title I of the statute. Instead, Congress deliberately declined to authorize the private litigants or the Secretary to pursue remedies against nonfiduciary parties in interest.

## III. The Question Presented Is Important and Recurring.

1. As shown by the number of litigated cases on the issue (*e.g.*, Pet 9-10 & n.5), the question presented arises frequently in the lower courts. The Seventh Circuit's decision in this case, though correct, created a clear split among the circuits that cannot be resolved by the lower courts. The Seventh Circuit expressly rejected the position embraced by five other circuits, and it made clear that it will not reconsider its decision through the *en banc* process: recognizing that its decision in this case created a circuit split, the panel circulated the decision to all the judges of the court in regular active service as required by the Seventh Circuit's local rules. Only one judge voted for rehearing en banc, even though the full court of appeals had the benefit of the reasoning of five circuits, disagreeing with the panel's proposed decision, at the time the court considered the decision for rehearing en banc. If the Seventh Circuit is unwilling to grant rehearing to reconsider the decision below under these circumstances it is difficult to imagine why it would grant rehearing on this issue in the future. Unless resolved by this Court, therefore, the split among the circuits is certain to persist.

2. The question of nonfiduciary liability is an important component of ERISA's enforcement regime. Private litigants brought approximately 9,457 cases under ERISA in the period from September 1997 until September 1998. Judicial



Business of the United States Courts, 1998 Annual Report of the Director Leonidas Ralph Mecham 144 (Administrative Office of the United States, 1999). In that same period the Secretary brought 119 such cases. *Ibid.* Many of these cases involve suits against nonfiduciary parties in interest who were involved in prohibited transactions—parties Congress did not intend to be defendants in ERISA cases brought by the Secretary or private parties. This unwarranted litigation, which taxes the resources of already overburdened courts as well as the litigants wrongly subjected to it, will continue in many circuits unless this Court reviews and affirms the decision below.

3. Only this Court has the authority to clarify the meaning and scope of *Mertens*, and to disavow the dicta on which most circuits have relied to reach a result so plainly contrary to ERISA's text and structure. Lower courts have struggled to determine whether *Mertens* endorses or precludes nonfiduciary party in interest liability under Section 502(a) when in fact the *Mertens* Court expressly "reserve[d] decision" on that very issue. *See Mertens*, 508 U.S. at 254-55. In light of the lower court's confusion, only this Court can properly interpret ERISA and restore uniformity to this important area of federal law.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## JOINT APPENDIX

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February 2000

**PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 4, 1999**
**CERTIORARI GRANTED JANUARY 7, 2000**

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

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Docket No. 92-CV-5883

HARRIS TRUST SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, AMERITECH CORPORATION, and JOHN A. EDWARDSON, PLAINTIFFS,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., DEFENDANTS

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**DOCKET ENTRIES**

| | | |
|---|---|---|
| 9/1/92 | 1 | COMPLAINT; jury demand. (Documents: 1-1 through 1-7) [Entry date 09/03/92] |
| 10/20/92 | 12 | MOTION by defendants to dismiss. [Entry date 10/21/92] |
| 10/20/92 | 13 | MEMORANDUM by defendant Salomon Brothers Inc, defendant – Salomon Brothers in support of motion to dismiss [12-1] [Entry date 10/21/92] |
| 10/20/92 | 14 | MINUTE ORDER of 10/20/92 by Hon. Marvin E. Aspen: Enter |

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| | | defendants' motion to dismiss [12-1] with memo in support. Plaintiffs to respond on or before 11/03/92. Defendants to reply by 11/13/92. The status hearing set for 10/20/92 is reset to 12/04/92 at 10:00 a.m. Mailed notice [Entry date 10/21/92] |
| 11/12/92 | 27 | MEMORANDUM by plaintiffs in opposition to defendants' motion to dismiss [12-1] [Entry date 11/16/92] |
| 11/25/92 | 28 | REPLY memorandum by defendant Salomon Brothers Inc, defendant Salomon Brothers in support of motion to dismiss defendants Salomon Bros Inc and Salomon Bros Realty Corp [12-1]. [Entry date 11/30/92] |
| 12/24/92 | 29 | MEMORANDUM, OPINION, AND ORDER [Entry date 12/28/92] |
| 12/24/92 | 30 | MINUTE ORDER of 12/24/92 by Hon. Marvin E. Aspen: Enter memorandum opinion and order: We grant defendants' motion to dismiss Counts II, IV, V, VI and VII of the complaint and deny their motion to dismiss Counts I, III, VIII, IX and X [12-1]. [Entry date 12/28/92] |
| 2/12/93 | 37 | MOTION by plaintiffs for leave to file the first amended complaint, instanter. [Entry date 02/16/93] |



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| 2/12/93 | 38 | MINUTE ORDER of 2/12/93 by Hon. Marvin E. Aspen: Plaintiffs' motion for leave to file first amended complaint instanter [37-2] is granted. [Entry date 02/16/93] |
| 2/12/93 | 39 | FIRST AMENDED COMPLAINT [1-1] by plaintiffs; jury demand. [Entry date 02/16/93] |
| 3/5/93 | 40 | MOTION by plaintiffs for leave to file second amended complaint. [Entry date 03/09/93] |
| 3/5/93 | 41 | MINUTE ORDER of 3/5/93 by Hon. Marvin E. Aspen: Plaintiffs' motion for leave to file second amended complaint [40-1] is granted. [Entry date 03/09/93] |
| 3/5/93 | 42 | SECOND AMENDED COMPLAINT [39-1] by plaintiff Harris Trst Svgs Bk, plaintiff Ameritech Corp, plaintiff John A. Edwardson; jury demand. [Entry date 03/09/93] |
| 4/6/93 | 45 | ANSWER to Counts I, II and VIII through X of the second amended complaint and counterclaims against plaintiff Ameritech Corporation by defendant Salomon Brothers Inc, defendant Salomon Brothers [Entry date 04/07/93] |

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| 4/9/93 | 47 | MOTION by defendants to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [Entry date 04/12/93] |
| 4/9/93 | 48 | MEMORANDUM by defendants in support of motion to dismiss counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 04/12/93] |
| 5/5/93 | 53 | MOTION by plaintiffs to dismiss defendants' counterclaims [Entry date 05/06/93] |
| 5/5/93 | 54 | MEMORANDUM by plaintiffs in support of motion to dismiss defendants' counterclaims [53-1] [Entry date 05/06/93] |
| 5/5/93 | 55 | RESPONSE by plaintiffs to defendants' motion to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 05/06/93] |
| 6/8/93 | 57 | REPLY memorandum by defendants in support of their motion to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 06/09/93] |
| 6/21/93 | 58 | REPLY memorandum by plaintiffs in support of their motion to dismiss |



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| | | defendants' counterclaims [53-1] [Entry date 06/22/93] |
| 6/21/93 | 59 | STATEMENT on Mertens v. Hewitt Associates and surreply by plaintiff to defendants' motion to dismiss Counts III, IV, V, VI, VII, XI and XII of the second amended complaint [47-1] [Entry date 06/22/93] |
| 6/25/93 | 60 | MOTION by plaintiffs for leave to fil[e] a statement on Mertens v. Hewitt Associates and surreply memorandum |
| 6/25/93 | 61 | MINUTE ORDER of 6/25/93 by Hon. Marvin E. Aspen: Granting plaintiffs' motion for leave to file a statement on Mertens v. Hewitt Associates and surreply memorandum [60-1] |
| 8/16/93 | 68 | MEMORANDUM OPINION AND ORDER [Entry date 08/17/93] |
| 8/16/93 | 69 | MINUTE ORDER of 8/16/93 by Hon. Marvin E. Aspen: Enter memorandum opinion and order: We grant Salomon's motion to dismiss Counts IV through VII, XI and XII, deny motion to dismiss Count III [47-1] and deny plaintiff's motion to dismiss defendants' counterclaims [53-1]. |

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| 8/31/93 | 73 | 08/30/93 ANSWER to counts I, II, III and VIII through X of the second amended complaint [42-1] and COUNTERCLAIM by defendants against plaintiff Ameritech Corp. [Entry date 09/02/93] |
| 9/24/93 | 74 | ANSWER TO COUNTERCLAIM [73-2] and affirmative defenses by plaintiff Ameritech Corp; Notice of filing. [Entry date 09/28/93] |
| 10/14/93 | 75 | AMENDED ANSWER [74-1] and affirmative defenses to defendants' counterclaims by counter-defendant Ameritech Corp [Entry date 10/15/93] |
| 1/18/94 | 83 | CONSENT to proceed before a Magistrate Judge by plaintiffs and defendants. [Entry date 01/26/94] |
| 1/24/94 | 84 | REASSIGNMENT ORDER of 01/20/94: Case reassigned to Hon. Joan H. Lefkow from Hon. Marvin E. Aspen pursuant to local General Rule 2.41(d). (For further detail see order). [Entry date 01/26/94] |
| 6/13/95 | 116 | MOTION by plaintiffs for partial summary judgment [Entry date 06/14/95] |
| 6/13/95 | 117 | MEMORANDUM by plaintiffs in support of their motion for partial summary judgment [116-1] [Entry |



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|---|---|---|
| | | date 06/14/95] |
| 6/13/95 | 118 | MOTION by defendants for summary judgment on plaintiffs' federal claims [Entry date 06/14/95] |
| 6/13/95 | 119 | MEMORANDUM of law by defendant in support of motion for summary judgment on plaintiffs' federal claims [118-1] [Entry date 06/14/95] |
| 6/13/95 | 121 | STATEMENT of material facts as to which there is no genuine issue by plaintiffs [Entry date 06/14/95] |
| 6/13/95 | 122 | ALTERNATIVE MOTION by defendants for summary judgment on plaintiffs' state law claims [Entry date 06/14/95] |
| 6/13/95 | 123 | MEMORANDUM of law by defendants in support of alternative motion for summary judgment on plaintiffs' state law claims [122-1] [Entry date 06/14/95] |
| 6/13/95 | 124 | STATEMENT pursuant to Rule 12(m) of material facts as to which there is no genuine issue by defendants [Entry date 06/14/95] |
| 7/18/95 | 130 | CONSENT by defendants to plaintiffs' motion to defer briefing on defendants' motion as to plaintiffs' state law claims pending |

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| | | resolution of cross-motions for summary judgment on plaintiffs' federal claims [Entry date 07/19/95] |
| 7/20/95 | 132 | MOTION by plaintiffs Harris Trst Svgs Bk, Ameritech Corp to defer briefing on defendants' motion as to plaintiffs' state claims pending resolution of cross motions for summary judgment on plaintiffs' federal claims [Entry date 07/28/95] |
| 7/20/95 | 133 | MINUTE ORDER of 7/20/95 by Hon. Joan H. Lefkow: Granting plaintiffs' motion to defer briefing on defendants' motion as to plaintiffs' state claims pending resolution of cross for summary judgment on plaintiffs' federal claims [132-1] [Entry date 07/28/95] |
| 9/27/95 | 136 | MOTION by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. to strike affidavits of plaintiffs' proposed law professor "experts" [Entry date 10/04/95] [Edit date 10/04/95] |
| 9/27/95 | 137 | MEMORANDUM of law by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. in support of motion to strike affidavits of plaintiffs' proposed law professor "experts" [136-1] [Entry date 10/04/95] |



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| 9/27/95 | 138 | BINDER OF MATERIALS filed by defendants Salomon Brothers Inc. and Salomon Brothers Realty Corp. cited in defendants' memorandum of law in support [137-1] of motion to strike plaintiffs' proposed law professor "experts" (1 vol.) [Entry date 10/04/95] [Edit date 10/04/95] |
| 9/27/95 | 139 | MEMORANDUM of law by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. in support of objections to evidentiary matters offered in plaintiffs' 12(M) statement [Entry date 10/04/95] |
| 9/27/95 | 141 | MEMORANDUM of law by defendants Salomon Brothers Inc and Salomon Brothers Realty Corp. in opposition to plaintiffs' motion for summary judgment [116-1]; [Entry date 10/04/95] [Edit date 10/04/95] |
| 9/27/95 | 143 | RULE 12(N) Statement by Salomon Brothers Inc and Salomon Brothers Realty Corp. in response to plaintiffs' 12(m) statement dated 05/12/95 (Volumes A through G, #143 through #143-7) [Entry date 10/04/95] |
| 9/27/95 | 145 | MEMORANDUM of law by plaintiffs in opposition to defendants' motion for summary |

judgment [122-1] [118-1] [Entry date 10/04/95]

9/27/95 147 RULE 12(N) RESPONSE by plaintiffs to "defendants' statement pursuant to Rule 12(m) of material facts as to which there is no genuine issue" (1 vol.) [Entry date 10/04/95]

9/27/95 148 DECLARATION by Leonard S. Chaikind to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibit) (Attachment) [Entry date 10/04/95]

9/27/95 149 DECLARATION by Sean F. Hennessey to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95]

9/27/95 150 DECLARATION by Charles S. Henry to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95]

9/27/95 151 DECLARATION by J. Steven Manolis to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment [Entry date 10/04/95]

9/27/95 152 DECLARATION by James Richmond Jr. to accompany



Salomon's opposition [141-1] to plaintiffs' motion for summary judgment [Entry date 10/04/95]

9/27/95 153 DECLARATION by Henry B. Staley to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95] [Edit date 10/04/95]

9/27/95 154 DECLARATION by [Gregory] A. White to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) [Entry date 10/04/95]

9/27/95 155 DECLARATION by Gary B. Hedges to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits). (1 vol.) [Entry date 10/04/95]

9/27/95 156 DECLARATION by Michael Bradley to accompany Salomon's opposition [141-1] to plaintiffs' motion for summary judgment (Exhibits) (1 vol.) [Entry date 10/04/95]

10/25/95 159 OPPOSITION by plaintiffs to defendants' motion to strike evidence contained in plaintiffs' 07/11/95 12N response (Exhibits) [Entry date 11/01/95]

| | | |
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| 10/25/95 | 160 | MEMORANDUM of law by plaintiffs in opposition to defendants' motion to strike affidavit testimony of Professors Joel Seligman and John C. Coffee, Jr. that the fee agreements are not securities [Entry date 11/01/95] |
| 10/25/95 | 161 | REPLY memorandum by plaintiffs in support of their motion for partial summary judgment [116-1] [Entry date 11/01/95] |
| 10/25/95 | 162 | 12N REPLY by plaintiffs to Solomon's statement of additional facts which require the denial of plaintiffs' motion for summary judgment on plaintiffs' ERISA Claims", Part I [Entry date 11/01/95] |
| 10/25/95 | 163 | 12N REPLY by plaintiffs to Solomon's statement of "additional facts which require the denial of plaintiffs' motion for summary judgment on plaintiffs' ERISA claims", Part II [Entry date 11/01/95] |
| 10/25/95 | 165 | SALOMON Errata to Salomon 12(M) statement dated 05/12/95 [Entry date 11/01/95] |
| 10/25/95 | 166 | SALOMON errata to Salomon 12N statement dated 07/11/95 [Entry date 11/01/95] |



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| 10/25/95 | 167 | (1) OBJECTIONS to certain new materials referred to in plaintiffs' 12N reply to Salomon's 12N statement, and (2) responses to certain of plaintiffs' objections to Salomon's evidence by defendants' [Entry date 11/01/95] |
| 10/25/95 | 168 | REPLY memorandum by defendants in further support of objections to evidentiary matters offered in plaintiffs' 12(M) statement [Entry date 11/01/95] |
| 10/25/95 | 169 | REPLY memorandum by defendants in further support of motion to strike affidavits of plaintiffs' proposed law professor "experts" [136-1] [Entry date 11/01/95] |
| 10/25/95 | 170 | MEMORANDUM of law by defendants in support of motion to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response [Entry date 11/01/95] |
| 10/25/95 | 171 | REPLY memorandum in further support of defendants' motion for summary judgment on plaintiffs' federal claims by defendants [Entry date 11/01/95] |
| 10/25/95 | 173 | COMPOSITE document which includes (1) defendants' 12(m) statement, (2) plaintiffs' 12N |

responses thereto, and (3) defendants' objections to certain evidence contained in plaintiffs' 12N responses and replies to plaintiffs' 12N(3)(b) assertions by defendants [Entry date 11/01/95]

10/25/95 174 MOTION by defendants to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response (Exhibits) [Entry date 11/01/95]

10/25/95 175 BINDER of legislative history and other materials submitted in support of Salomon's motion for summary judgment and in opposition to plaintiffs' motion for summary judgment by defendants (Exhibits) [Entry date 11/01/95]

10/25/95 176 COMPOSITE document which includes (1) defendants' 12(m) statement, (2) plaintiffs' 12N responses thereto, and (3) defendants' objections to certain evidence contained in plaintiffs' 12N responses and replies to plaintiffs' 12N(3)(b) assertions [Entry date 11/01/95]

11/1/95 178 ADDITIONAL MATERIALS filed by plaintiffs in support of plaintiffs' reply memorandum [161-1] in support of their motion for partial summary judgment and memoranda in opposition to defendants



evidentiary objections [167-1] (2 vols. #178-1 and #178-2) [Entry date 11/07/95] [Edit date 11/07/95]

11/6/95 179 OBJECTION by plaintiff Harris Trst Svgs Bk to defendants' surreply materials; Notice of filing [Entry date 11/08/95]

11/9/95 180 RESPONSE by defendants to plaintiffs' objection to defendants' (alleged) surreply materials [179-1]; Notice of filing [Entry date 11/15/95]

11/9/95 181 REPLY MEMORANDUM by defendants in further support of motion to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response [174-1] [Entry date 11/15/95]

2/2/96 187 MEMORANDUM by defendants counter-claimants addressing cases supplementally submitted by plaintiffs on the parties' cross-motions for summary judgment [Entry date 02/05/96]

2/16/96 188 SUPPLEMENTAL MEMORANDUM IN RESPONSE by plaintiffs to defendants' memorandum of 01/26/96 [Entry date 02/21/96]

4/2/96 190 AMENDED ERRATA by

| | | |
|---|---|---|
| | | defendants/counter-claimants to Salomon 12(M) statement dated 05/12/96 [143-1] [165-1] [Entry date 04/03/96] |
| 4/2/96 | 191 | AMENDED ERRATA by defendants/counter-claimants to Salomon 12(N) statement dated 07/11/95 [166-1] [Entry date 04/03/96] |
| 4/2/96 | 192 | DESCRIPTION by plaintiffs, defendants/counter-claimants and counter-defendant of joint compilation of testimony and documents (Exhibits); Joint notice of filing [Entry date 04/03/96] |
| 4/17/96 | 193 | BINDERS filed by defendants of key testimony and documents relating to Salomon 12(m) statement paragraphs 27 and 64 to 71 [124-1] (2 vols. #193-1 and #913-2) |
| 6/13/96 | 194 | MEMORANDUM DECISION [Entry date 06/18/96] |
| 6/13/96 | 195 | MINUTE ORDER of 6/13/96 by Hon. Joan H. Lefkow: Defendants' motion to strike affidavits of plaintiffs' proposed law professor "experts" [136-1] is granted. Defendants' motion to strike certain evidence relied upon in plaintiffs' 07/11/95 12N response [174-1] is denied as moot in light of the other |



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| | | rulings contained herein. Defendants' motion for summary judgment on plaintiffs' federal claims [118-1] is granted as to Counts I and III and as to any claims contained in Count II which are premised on an alleged breach of fiduciary duty. Plaintiffs' motion for partial summary judgment [116-1] is denied with respect to Count II of the second amended complaint and granted with respect to defendants' counterclaims for contribution. Enter memorandum decision. [Entry date 06/18/96] |
| 7/22/96 | 196 | MOTION by defendants to reconsider in light of 06/10/96 U.S. Supreme Court opinion in Lockheed Corp. v. Spink or, in the alternative, to amend this Court's order to certify the order for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) to permit review of two controlling legal issues (Exhibits); Amended notice of motion [Entry date 07/24/96] |
| 7/22/96 | 197 | MEMORANDUM by defendants in support of motion to reconsider in light of 06/10/96 U.S. Supreme Court opinion in Lockheed Corp. v. Spink [196-1] or, in the alternative, to amend this Court's order to certify the order for interlocutory appeal pursuant to 28 U.S.C. Section |

1292(b) to permit review of two controlling legal issues [196-2] (Exhibit) [Entry date 07/24/96]

7/22/96 198 MOTION by defendants to modify this Court's decision to confirm that (unless otherwise expressly stated) statements of facts in the section of the decision entitled "Factual Background" or elsewhere in the decision constitute statements of the non-movant's evidence or reasonable inferences therefrom (Exhibit); Amended notice [Entry date 07/24/96]

7/22/96 199 MEMORANDUM by defendants in support of Salomon's motion to modify this Court's decision to confirm that (unless otherwise stated) statements of facts in the section of the decision entitled "Factual Background" or elsewhere in the decision constitute statements of the non-movant's evidence or reasonable inferences therefrom [198-1] [Entry date 07/24/96]

7/22/96 200 MINUTE ORDER of 7/22/96 by Hon. Joan H. Lefkow: Status hearing held and continued to 2:00 pm on 9/9/96. Salomon's motion to reconsider in light of 06/10/96 U.S. Supreme Court opinion in Lockheed Corp. v. Spink [196-1] or, in the alternative, to amend this Court's



order to certify the order for interlocutory appeal to 28 U.S.C. Section 1292(b) to permit review of two controlling legal issues [196-2] and Salomon's motion to modify this Court's decision to that (unless otherwise expressly stated) statements of fact in the section of the decision entitled "Factual Background" or elsewhere in the decision constitute statements of the non-movant's evidence or reasonable inferences therefrom [198-1] are entered and continued to 2:00 p.m. on 9/9/96. No notice (ar) [Entry date 07/24/96]

9/9/96 204 MEMORANDUM of law by plaintiffs in opposition to defendants' motion for interlocutory appeal [196-2] (Attachment). [Entry date 09/10/96]

9/9/96 202 [PROPOSED] ORDER modifying this Court's decision to confirm that statements of the facts in the decision constitute a statement of the non-moving party's evidence [Entry date 09/10/96]

9/9/96 203 MINUTE ORDER of 9/9/96 by Hon. Joan H. Lefkow: Status hearing held. Defendants' motion to modify this Court's decision to confirm that statements of the facts in the decision constitute a statement

of the non-moving party's evidence [198-1] is granted. Enter order. Plaintiffs' oral motion for leave to file memorandum in opposition to defendants' motion for interlocutory appeal [0-1] is granted. Defendants' oral motion to reply to the memorandum [0-1] is granted. Defendants to file reply on or before 09/18/96 [196-2]. Hearing and ruling on the motion for interlocutory appeal is set for 9:45 a.m. on 9/26/96 [196-1]. [Entry date 09/10/96]

9/18/96 205 REPLY MEMORANDUM by defendants in further support of Salomon's motion to reconsider in light of 06/10/96 U S. Supreme Court opinion in Lockheed Corp. v. Spink [196-1], or in the alternative, to amend this Court's order to certify the order for interlocutory appeal pursuant to 28 U.S.C. Section 1292(b) to permit review of two controlling legal issues [196-2] (Exhibits) [Entry date 09/20/96] [Edit date 09/20/96]

9/24/96 206 ORDER on motion to reconsider [196-1] or to certify for immediate appeal [196-2] [Entry date 09/26/96]

9/24/96 207 MINUTE ORDER of 9/24/96 by Hon. Joan H. Lefkow: It is hereby ordered that defendant's motion for



reconsideration of this court's decision and order of 06/13/96 [196-1] or, in the alternative, to amend the court's order so as to certify it for interlocutory appeal [196-2] is denied in its entirety. Plaintiffs are further ordered to file their response to Salomon's alternative motion for summary judgment on plaintiffs' state law claims [122-1] on or before 10/25/96 and defendant shall file thereto on or before 11/8/96 [122-1]. Enter ruling on to reconsider or certify for immediate appeal. [Entry date 09/26/96] [Edit date 09/27/96]

11/19/96 210 MEMORANDUM of law by defendants in further support of motion for summary judgment on plaintiffs' state law claims [122-1]; Notice of filing [Entry date 11/21/96]

12/20/96 216 SURREPLY by Harris Trst Svgs Bk and Ameritech Corp to defendants' alternative motion for summary judgment on plaintiffs' state law claims [122-1]. [Entry date 12/26/96] [Edit date 12/26/96]

12/23/96 218 MEMORANDUM by defendants bringing to the Court's attention a recent change in the statutory language of the consumer Fraud Act; Notice of filing [Entry date 12/26/96] [Edit date 12/26/96]

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| 6/5/97 | -- | EXECUTIVE committee order of 06/05/97 Case reassigned to Hon. Ian H. Levin from Hon. Joan Humphrey Lefkow pursuant to consent [Entry date 06/09/97] |
| 7/10/97 | 222 | MOTION by plaintiffs to retain referral of proceedings to Magistrate Judge Joan Lefkow (Exhibits); Notice of motion [Entry date 07/23/97] |
| 7/15/97 | 223 | MINUTE ORDER of 7/15/97 by Hon. Marvin E. Aspen: Plaintiffs' motion to retain referral of proceedings to Magistrate Judge Joan Lefkow is granted. [222-1] [Entry date 07/23/97] |
| 7/23/97 | 224 | MINUTE ORDER of 7/23/97 by Hon. Marvin E. Aspen: The Court having granted plaintiffs' motion to retain reassignment to the calendar of Magistrate Judge Lefkow, it is hereby ordered that the reassignment of this case, Harris Trust v. Salomon Brothers, et al., number 92 C 5883, be removed from the calendar of Magistrate Judge Levin, and that it be reassigned and returned to the calendar of Magistrate Judge Lefkow in the interest of judicial efficiency. [Entry date 07/28/97] |
| 9/30/97 | 225 | MEMORANDUM decision [122-1] |



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| 9/30/97 | 226 | MINUTE ORDER of 9/30/97 by Hon. Joan H. Lefkow: Defendants' alternative motion for summary judgment on plaintiffs' state law claims [122-1] is granted with respect to counts VIII - X of the second amended complaint. Enter memorandum decision. |
| 10/20/97 | 227 | RENEWED MOTION by defendants to amend the Court's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) to permit review of two controlling legal issues (Exhibits) [Entry date 10/21/97] |
| 10/20/97 | -- | EXECUTIVE committee order of 10/20/97: Case reassigned to Hon. Ronald A. Guzman. [Entry date 10/21/97] |
| 11/5/97 | 229 | JOINT MOTION by plaintiffs, defendants to reassign (Exhibits) [Entry date 11/18/97] |
| 11/7/97 | 230 | MINUTE ORDER of 11/7/97 by Hon. Marvin E. Aspen: Joint motion to reassigned is granted. [229-1] [Entry date 11/18/97] |
| 11/21/97 | 231 | REASSIGNMENT ORDER of 11/17/97: Case reassigned to Hon. Judge Warren K. Urbom from Magistrate Judge Ronald A. |

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| | | Guzman pursuant to local General Rule 2.30(e). (For further detail see order.) [Entry date 11/24/97] |
| 11/24/97 | 232 | RENEWED MOTION by defendants (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order (Exhibits) (Exhibit) [Entry date 11/25/97] |
| 11/24/97 | 233 | MEMORANDUM by defendants in support of renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) [232-1], or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order [232-2] [Entry date 11/25/97] |
| 11/24/97 | 234 | APPENDIX filed by defendants to accompany memorandum [233-1] (2 Vols.: 234-1 and 234-2) [Entry date 11/25/97] |
| 12/12/97 | 235 | MEMORANDUM by plaintiff Harris Trst Svgs Bk of law in opposition to defendants' renewed motion for interlocutory appeal [232-1], [232-2] (Exhibits) |



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| 12/22/97 | 236 | REPLY by defendants memorandum in further support of Salomon's renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b) or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order [233-1] [Entry date 12/23/97] |
| 1/7/98 | 237 | MEMORANDUM AND ORDER on defendants' renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order [Entry date 01/15/98] |
| 1/7/98 | 238 | MINUTE ORDER of 1/7/98 by Hon. Warren K. Urbom: Enter Memorandum and Order: Defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal [227-1], [232-1], [232-2] [Entry date 01/15/98] |
| 3/31/98 | 239 | CERTIFIED copy of Order from the 7th Circuit. It is ordered that #1, Salomon's petition for permission to appeal pursuant to 28 U.S.C. 1292(b), filed on 1/16/98, by the petitioners is granted. Appellant is |

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| | | directed to tender the docketing fee to the clerk of the District Court no later than 4/1/98. [Entry date 04/01/98] |
| 4/1/98 | -- | TRANSMITTED to the 7th Circuit the short record on appeal. Mailed notice to all counsel. |
| 4/7/98 | 241 | ACKNOWLEDGEMENT of receipt of short record on appeal USCA 98-1812 (Attachment) |
| 4/10/98 | 242 | DESIGNATION by Salomon Brothers, Salomon Brothers Inc of appeal record no. 98-8002 [Entry date 04/13/98] |
| 4/15/98 | 243 | EXHIBITS by defendants Salomon Brothers and Salomon Brothers Inc (3bxs. 243-1 through 243-3). [Entry date 04/16/98] |
| 4/17/98 | -- | TRANSMITTED to the 7th Circuit the long record on appeal no. 98-1812 consisting four volumes of pleadings, five volumes of exhibits, four volumes of transcripts, fifteen volumes of loose pleadings and certificate re appeal. |
| 6/26/98 | 244 | PROPOSED ORDER granting request to re-furnish record materials (Exhibit) [Entry date 06/29/98] |
| 6/26/98 | 245 | MINUTE ORDER of 6/26/98 by |



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| | | Hon. Marvin E. Aspen: Enter order: to insure the completeness of the record on appeal. It is hereby ordered that defendants are granted permission to refurnish the following record materials, which may not be readily locatable in the Court's files: 1) 3 boxes of publicly filed deposition testimony and exhibit excerpts. 2) Declaration by Donald C. Langevoort dated 6/19/95, and the exhibit thereto, originally filed on or before 9/27/95. The Clerk of the Court shall transmit these to the U.S. Court of Appeals for the 7th Circuit. [Entry date 06/29/98] |
| 6/30/98 | -- | TRANSMITTED to the 7th Circuit supplement to appeal no. 98-1812 consisting of document numbers 244 and 245 and certified copy of docket sheet. |
| 7/21/98 | 246 | ONE LARGE BROWN BOX by defendants of copies of loose pleadings (15 Vols.: 246-1 through 246-15) |
| 7/22/98 | -- | TRANSMITTED to the 7th Circuit supplement to appeal no. 98-1812 consisting of certified copy of docket sheet, copy of Judge Aspen's order dated 6/26/98, document number 245 and one large brown box by defendants, document |

number 246.

7/24/98 -- TRANSMITTED to the 7th Circuit supplement to appeal no. 98-1812 consisting of certified copy of docket sheet, Copy of Judge Aspen's order dated 6/26/98, doc. No. #245 and one large brown box by defendants of copies of loose pleadings (15 Vols.: 246-1 through 246-15.)



UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Docket Nos. 98-1812, 98-8002

HARRIS TRUST SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, AMERITECH CORPORATION, and JOHN A. EDWARDSON, PLAINTIFFS-APPELLEES,

v.

SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., DEFENDANTS-APPELLANTS

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**DOCKET ENTRIES**

1/16/98 Petition for Permission to appeal pursuant to 28 U.S.C. 1292(b) docketed (D.C. no. 92 C 5883) [98-8002] [1025028-1]

1/22/98 ORDER: Filed clerk's notice to Respondent Harris Trust Savings, Respondent Ameritech Corp, Respondent John A. Edwardson to file a response to "SALOMON'S PETITION FOR PERMISSION TO APPEAL PURSUANT TO 28 U.S.C. SECTION 1292(b)", filed on 1/16/98, by counsel for the petitioners. [1025021-1] MAF [98-

8002]

2/5/98 Filed Respondent Harris Trust Savings, Respondent Ameritech Corp opposition to Petitioner Salomon Brothers, In, Petitioner Salomon Brothers Rea motion Salomon's petition for permission to appeal. [98-8002] [1025021-1]

2/5/98 Filed Respondent Harris Trust Savings, Respondent Ameritech Corp, Respondent John A. Edwardson opposition to Petitioner Salomon Brothers, In, Petitioner Salomon Brothers Rea motion Salomon's petition for permission to appeal pursuant to 28 U.S.C. 1292(b). [98-8002] [1039323-1]

3/26/98 ORDER issued GRANTING the petition for permission to appeal pursuant to 28 U.S.C. 1292(b). NM [98-8002]

4/1/98 Case transferred from Miscellaneous Docket No. 98-8002 [98-1812] [1025021-1]

4/1/98 Private civil case docketed. (98-1812) [1048424-1]

4/1/98 [98-1812] ROA from No. Dist. of IL., E. Div. due 4/9/98.

4/2/98 Filed Petitioner Salomon Brothers,



In, Petitioner Salomon Brothers Rea docketing statement. [98-8002] [1048493-1]

4/17/98 Original record on appeal filed. Contents of record: 4 vol. pleadings; 4 vol. transcripts; 15 vol. loose pleadings, 5 vol. & 3 boxes exhibits; 14 sealed envelopes. [98-1812] [1054385-1]

4/28/98 Filed oversized record in Section #16 of exhibit room: 2 boxes containing 4 vol. pleadings; 15 vol. loose pleadings; 4 vol. transcripts; 5 vol. & 3 boxes exhibits. [1048424-1] [98-1812]

7/1/98 Supplemental record on appeal filed. Contents of record: 1 vol. pleadings. [98-1812] [1076875-1]

7/24/98 Supplemental record on appeal filed. Contents of record: 15 vol. loose pleadings (contained in one large brown box). [98-1812] [1083973-1]

7/27/98 Filed oversized record in Section #18 of exhibit room: 1 box containing 15 vol. Loose pleadings. [1048424-1] [98-1812]

8/5/98 Filed 15c appellant's brief by Salomon Brothers, In, Salomon Brothers Rea. Disk filed. [98-1812] [1087970-1] (patb)

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| 8/5/98 | Filed 10c appendix by Appellant Salomon Brothers, In, Appellant Salomon Brothers Rea. [98-1812] [1087974-1] |
| 8/10/98 | Filed oversized record in Section # 18 of exhibit room: 1 box containing appendix (8/5). [1048424-1] [98-1812] |
| 9/24/98 | Filed 15c appellee's brief by Harris Trust Savings, Ameritech Corp. [98-1812] [1103299-1] |
| 9/24/98 | Filed 10c appendix by Appellee Harris Trust Savings. Appellee Ameritech Corp. (98-1812] [1103306-1] |
| 10/9/98 | ORDER issued GRANTING motion to file appellees' brief responsive brief under seal. [1103525-1] The clerk of this court is directed to file instanter the tendered copies of the appellees' brief under seal. [1103525-1] LAH [98-1812] |
| 10/9/98 | Filed 15c appellee's brief by Harris Trust Savings. Ameritech Corp. per order. (Under Seal). [98-1812] [1108980-1] |
| 10/16/98 | Filed oversized record in Section #16 of exhibit room: 1 box containing appendix (9/24). |



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| | [10484240-1] [98-1812] |
| 10/19/98 | Filed 15c appellant's reply brief by Salomon Brothers, In, Salomon Brothers Rea. [98-1812] [1111044-1] |
| 10/30/98 | Filed oversized record in Section # 16 of exhibit room: 1 box containing reply brief & appendix (10/19). [1048424-1] [98-1812] |
| 11/30/98 | Case heard and taken under advisement by panel: Circuit Judge Joel M. Flaum, Circuit Judge Michael S. Kanne, Circuit Judge Terence T. Evans. [98-1812] [1123716-1] |
| 11/30/98 | Case argued by Charles C. Jackson for Appellee John A. Edwardson, Appellee Ameritech Corp., Appellee Harris Trust Savings, Peter C. Hein for Appellant Salomon Brothers Rea. Appellant Salomon Brothers, In. [98-1812] [1048424-1] |
| 12/4/98 | Filed Appellee Harris Trust Savings, Appellee Ameritech Corp. Citation of Additional Authority, per CR 28(e). Dist. [98-1812] [1125731-1] |
| 12/14/98 | Filed Appellant Salomon Brothers, In, Appellant Salomon Brothers Rea Citation of Additional Authority, per CR 28(e). Dist. [98-1812] |

[1128567-1]

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| 1/28/99 | Filed Appellant Salomon Brothers, In, Appellant Salomon Brothers Rea Citation of Additional Authority, per CR 28(e). Dist. [98-1812] [1142325-1] |
| 2/4/99 | Filed Appellee Harris Trust Savings, Appellee Ameritech Corp., Appellee John A. Edwardson Citation of Additional Authority, per CR 28(e). Dist. [98-1812] [1145168-1] |
| 7/6/99 | Filed opinion of the court by Judge Evans. REVERSED and summary judgment is granted to Salomon Brothers. Circuit Judge Joel M. Flaum, Circuit Judge Michael S. Kanne, Circuit Judge Terence T. Evans. [98-1812] [1048424-1] Because this opinion creates a circuit split, it has been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e). Judge Coffey did not participate in the circulation due to a conflict. All other judges voted not to rehear the case en banc except Judge Ripple who voted to grant rehearing en banc. |
| 7/6/99 | ORDER: Final judgment filed per opinion. With costs: y. [98-1812] [1194504-1] |



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| 7/26/99 | Filed motion by Appellee Harris Trust Savings, Appellee Ameritech Corp. Appellee John A. Edwardson to stay the mandate. [1200794-1] [98-1812] |
| 8/2/99 | ORDER issued GRANTING motion to stay the mandate. Counsel for appellees is reminded of its obligation under Fed. R. App. P. 41 (d)(2)(B). [1200794-1] LH [98-1812] |
| 10/13/99 | Filed notice from the Supreme Court of the filing of a Petition for Writ of Certiorari. Supreme Court Case No.: 99-579. [98-1812] [1224184-1] |

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Plaintiffs' Second Amended Complaint in Harris Trust v. Salomon Brothers, dated March 3, 1993**

(R. 42) (Sal. C.A. App. 292-307, at 295-97, 300-06) (Excerpts)

**PARTIES**

6. Harris Trust and Savings Bank is a directed trustee of APT and a fiduciary of the Ameritech pension plans funded through APT within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). Harris Trust executed, on behalf of APT, each of four assignments by Salomon to APT of 95% to 100% of Salomon's interests in the MOA and Best Fee Agreements. See Complaint Exhibits A, B, C & D (Fee Agreements 1 through 4, with Assignments).

7. Ameritech is an employer within the meaning of ERISA § 3(5), 29 U.S.C. § 1002(5); a fiduciary of the Ameritech Pension Plan, the Ameritech Management Pension Plan, and APT within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A); and the plan sponsor of the Ameritech Pension Plan and Ameritech Management Pension Plan (collectively the "Plan") within the meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). There are more than 115,000 active and retired participants in the Plan, which is an "employee benefit plan" within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3). The Plan is subject to the coverage of ERISA pursuant to ERISA § 4(a), 29 U.S.C. § 1003(a).

* * *

11. For the reasons set forth at ¶¶ 13-18, 21, 22, 26-29, 32, 33, 36, 38, 40, 42, 44-46 and 51, Salomon is a fiduciary



to the Plan, and a "party in interest" within the meaning of ERISA §§ 3(14)(A) & (B), (21)(A), 29 U.S.C. §§ 1002(14)(A)&(B), (21)(A).

**FACTS**

**Background**

12. Ameritech's Asset Management Committee had/has general authority for managing assets of the Plan and appointing investment managers to manage those assets. For the periods pertinent to Fee Agreements 1-4, Ameritech appointed National Investment Services of America, Inc. ("NISA"), whose principal place of business is in respect to a segment of APT -- the Dedicated Portfolio. With respect to these investments, NISA was both an "investment manager" and a "fiduciary" as those terms are used in ERISA Sections 3(38) and (21)(A), 29 U.S.C. §§ 1002(38), (21)(A). NISA was also a registered investment advisor under the Investment Advisors Act of 1940.

* * *

**COUNT I**

**Breach Of ERISA Fiduciary Duty**

63. This Count I is brought under ERISA Sections 404, 409 and 502, 29 U.S.C. §§ 1104, 1109 and 1132, for breach of fiduciary duties by Salomon.

64. Plaintiffs reallege and incorporate by this reference Paragraphs 1 through 62 above as Paragraph 64 of this Count I as though fully stated herein.

65. Salomon's misconduct complained of in Paragraph 64 violated ERISA's fiduciary duty rules, which apply to Salomon with respect to investment advice rendered by it in

connection with the purchases by APT of Fee Agreements 1-4, and with respect to its discretionary authority or control in managing or disposing of plan assets.

66. Salomon breached its fiduciary duties, failing to discharge them solely in the interest of participants and beneficiaries of the Plan, by:

(a) failing, when advising APT to purchase Salomon's interests, to fully, accurately, truthfully and prudently disclose investment risk and other information relating to Fee Agreements 1 through 4;

(b) failing, after the purchase by APT of Salomon's interests, to accurately, truthfully and prudently scrutinize, monitor and report the financial performance of Fee Agreements 1 and 2;

(c) advising APT to invest in Fee Agreement 3 when Salomon knew that Fee Agreements 1 and 2 would not perform to projections and that Portfolio III, upon which Fee Agreement 3 was based, would not perform as Salomon was representing;

(d) failing, after the purchase by APT of Salomon's interests, to accurately, truthfully and prudently scrutinize, monitor and report financial performance of Fee Agreement 3;

(e) advising APT to invest in Fee Agreement 4 when Salomon knew that Fee Agreements 1 and 2 would not perform to projections; and

(f) failing, after the purchase by Ameritech of Salomon's interests, to accurately, truthfully and prudently scrutinize, monitor and report financial performance of Portfolio 4.



67. As direct consequences of Salomon's affirmative misconduct, APT did not learn of the deteriorating performance of Fee Agreements 1 and 2; was induced and lulled into purchasing Fee Agreements 3 and 4; was prevented from learning certain material information concealed by Salomon with the intent to induce APT's purchases; and was damaged in that the worthless interests in Fee Agreements 3 and 4 would not have been purchased by APT had Salomon conducted itself prudently and truthfully. Salomon's failures to disclose constitute fraudulent concealment of Salomon's violation of ERISA Section 404.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That a judgment be entered against Salomon and in favor of Plaintiffs and payable to APT in the amount of the purchase price of Fee Agreements 1 through 4, plus appropriate prejudgment interest or repayment of income derived from principal, whichever is greater;

2. That Salomon also be required to disgorge to APT all profits made through the use of the Plan's assets by Salomon; and

3. That Plaintiffs be awarded such other and further relief and redress, as this Court deems just and equitable, including costs, post-judgment interest or repayment of income derived from principal, whichever is greater, and attorneys' fees.

**COUNT II**

**ERISA Prohibited Transactions**

68. This Count II is brought under ERISA Sections 406, 409 and 502, 29 U.S.C. §§ 1106, 1109 and 1132, to seek

relief from Salomon's prohibited transactions with respect to the Plan.

69. Plaintiffs reallege and incorporate by this reference Paragraphs 1 through 67 above as Paragraph 69 of this Count II as though fully stated herein.

70. Salomon caused the Plan to engage in and/or to participate in transactions prohibited by Section 406 of ERISA, 29 U.S.C. § 1106, by:

(a) failing to make full disclosure of investment information;

(b) selling property to the Plan of a type and in a manner for which no exemption is available, in violation of ERISA Section 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A);

(c) furnishing services to the Plan for excessive compensation, in violation of ERISA Sections 406(a)(1)(C) and 408(b)(2), 29 U.S.C. §§ 1106(a)(1)(C) and 1108(b)(2);

(d) transferring Plan assets to, and using Plan assets for the benefit of, a party in interest in violation of ERISA Section 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D);

(e) dealing with Plan assets in its own interest and for its own account, in violation of ERISA Section 406(b)(1), 29 U.S.C. § 1106(b)(1); and

(f) acting on its own behalf in transactions in which Salomon's interests were adverse to the Plan, in violation of ERISA Section 406(b)(2), 29 U.S.C. § 1106(b)(2).

71. On April 8, 1991, Ameritech filed with the Internal Revenue Service amended Forms 5500 for Plan years 1987,



1988 and 1989. The filing reported apparent prohibited transactions involving the APT investments in Fee Agreements 1, 2, 3 and 4.

72. As direct consequences of Salomon's affirmative misconduct, APT was induced and lulled into purchasing Fee Agreements 3 and 4; was prevented from learning certain material information concealed by Salomon with the intent to induce APT's purchases; and was damaged in that the worthless interests in the Fee Agreements would not have been purchased by APT had Salomon conducted itself prudently and truthfully. Salomon's failures to disclose constitute fraudulent concealment of Salomon's violations of ERISA Sections 406 and 408, 29 U.S.C. §§ 1106, 1108.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That a judgment be entered against Salomon requiring it to undo the prohibited transactions and place the Plan in the position it would have occupied had the prohibited transactions not occurred;

2. That a judgment be entered against Salomon in favor of Plaintiffs and payable to APT in the amount of the purchase price of Fee Agreements 1, 2, 3 and 4, with appropriate prejudgment interest or repayment of income derived from principal, whichever is greater;

3. That Salomon be required to disgorge to APT all profits made through the use of the Plan's assets by Salomon; and

4. That Plaintiffs be awarded such other and further relief and redress, as this Court deems just and equitable, including damages equal to any excise taxes, penalties and interest assessed against APT or Plaintiffs, costs, post-judgment interest, or repayment of income

derived from principal, whichever is greater, and attorneys' fees.

## COUNT III

### Knowing Participant Liability

73. This Count III is brought under federal common law and ERISA Sections 404, 409, and 502, 29 U.S.C. §§ 1104, 1109, and 1132, to impose liability on Salomon as a knowing participant in fiduciary violations.

74. Plaintiffs reallege and incorporate by this reference paragraphs 1 through 72 above as paragraph 74 of this Count III as though fully stated herein.

75. APT's purchase of interests in Fee Agreements 1 through 4 were made by NISA, the investment manager of APT's Dedicated Bond Portfolio and an ERISA fiduciary. NISA held all of the Fee Agreements for, or placed them into, the Dedicated Bond Portfolio.

76. NISA's purchases of interests in Fee Agreements 1 through 4 from Salomon were prohibited transactions under ERISA Section 406, 29 U.S.C. § 1106, for which no exemption was available. See PTE 75-1, 40 Fed. Reg. 50845. Salomon knowingly participated in NISA's fiduciary breaches by selling interests in Fee Agreements 1 through 4 to NISA for APT's Dedicated Bond Portfolio. In addition, at least as to Fee Agreements 3 and 4, Salomon induced the purchase of interests in those Agreements by trickery, with full knowledge that they were worthless, near to or in default, or at a minimum, had a value far less than represented.

77. As direct consequences of Salomon's affirmative misconduct, APT did not learn of the deteriorating performance of Fee Agreements 1 and 2; was induced and lulled into purchasing Fee Agreements 3 and 4; was prevented from learning certain material information



concealed by Salomon with the intent to induce APT's purchases; and was damaged in that the worthless interests in the Fee Agreements would not have been purchased by APT had Salomon conducted itself prudently and truthfully. Salomon's failures to disclose constitute fraudulent concealment of Salomon's violations of ERISA Sections 406 and 408, 29 U.S.C. §§ 1106, 1108.

WHEREFORE, Plaintiffs pray for relief as follows:

1. That a judgment be entered against Salomon requiring it to undo the prohibited transactions and place the Plan in the position it would have occupied had the prohibited transactions not occurred;

2. That a judgment be entered against Salomon and in favor of Plaintiffs and payable to APT in the amount of the purchase price of Fee Agreements 1, 2, 3 and 4, with appropriate prejudgment interest or repayment of income derived from principal, whichever is greater;

3. That Salomon be required to disgorge to APT all profits made through the use of the Plan's assets by Salomon; and

4. That Plaintiffs be awarded such other and further relief and redress, as this Court deems just and equitable, including damages equal to any excise taxes, penalties and interest assessed against APT or Plaintiffs, costs, post-judgment interest, or repayment of income derived from principal, whichever is greater, and attorneys' fees.

* * *

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Declaration of Charles S. Henry, Director in Salomon's Real Estate Department, dated June 16, 1995**

(R. 150) (Excerpts)

1. From March 1985 to September 1990 I was employed by Salomon Brothers Inc, and I served as the head of an informal hotel group in Salomon's real estate finance area. In this capacity, I participated in Salomon's work related to the financing of Motels of America Portfolio I, MOA Portfolio II, MOA Portfolio III (Cricket Inns), and the Best Inns portfolio.

* * *

3. There is a basic difference between an investment banking firm acting as principal and an investment banking firm acting as agent. As agent, an investment banking firm does not put any of its own capital at risk and simply agrees to try to sell to others the securities that the corporate issuer wants to sell. However, when an investment banking firm acts as principal -- as Salomon did in the financings of the MOA I, II and III and Best Inns portfolios -- the investment banking firm commits its own capital, actually funds the transaction and assumes all of the risks that go with making such a commitment as principal.

4. In the MOA Portfolio I transaction, Salomon acted as principal and committed to provide on a date certain (or at least within a narrow period of time), a $70.7 million loan to allow MOA to acquire 45 Super 8 motels; in the MOA Portfolio II transaction, Salomon acted as principal and committed to provide on a date certain (or at least within a narrow period of time), a $23.4 million loan to allow MOA



to acquire 7 motels; in the MOA Portfolio III transaction, Salomon acted as principal and committed to provide on a date certain a $63.2 million loan to allow MOA to acquire the 17 Cricket Inns; and in the Best Inns transaction, Salomon acted as principal and committed to provide on a date certain a $24.7 million loan to allow Best Inns to acquire 9 Best Inns of America franchised motels.

5. Salomon's commitments of its own capital as principal were of substantial value to MOA and Best Inns since Salomon's commitments enabled MOA and Best Inns to make their acquisitions and, in at least some cases, to negotiate more favorable terms for those acquisitions. In addition, in making these commitments and providing funds for the acquisitions, Salomon was subject to the market and other risks inherent in principal commitments of this magnitude for which Salomon wished to be compensated.

6. This is illustrated by what transpired concerning MOA's acquisition of Portfolio I. As I indicated in my deposition (pages 863-865), Salomon's original engagement with MOA concerning the acquisition of Portfolio I was to act only as placement agent for MOA and thus Salomon was not to assume the risk of financing the acquisition as principal (see engagement letter dated April 27, 1987, which I understand is Riedel Ex. 39). Under this arrangement, Salomon would attempt to sell the mortgage notes to others and would receive cash fees equal to 2½% of the proceeds of the financing, but would not receive any participation interest in the form of a fee agreement (or otherwise). However, thereafter MOA asked if Salomon would be willing to act as principal and agree to fund the acquisition on a date certain with approximately $70 million of Salomon's own money, rather than simply act as agent for MOA and attempt to sell the notes for a fee. I understood that MOA believed that this would enhance MOA's ability to negotiate the acquisition. Salomon was willing to act as principal and fund the

acquisition, but insisted upon the participation interest embodied in the fee agreement as additional compensation for assuming the principal risk (see first supplement to engagement letter dated July 31, 1987, which I understand is Riedel Ex. 41).

* * *

8. Salomon's commitments as principal also protected MOA against shifts in market interest rates after the date of funding by Salomon; even if interest rates went up after the date of funding, MOA would have locked in its interest cost. Likewise, MOA was protected from the risk that changes in investor sentiment or unexpected developments in the credit markets or motel industry would intervene to impede or disrupt the ability to market nonrecourse motel debt; Salomon -- not MOA -- bore those risks.

9. Because Salomon's commitment to fund these acquisitions as principal was of substantial value to MOA and Best Inns, MOA and Best Inns agreed to give Salomon the participation interests in future net cash flows, sale or refinancing proceeds and appreciation of the motel portfolios embodied in the fee agreements. These participation interests compensated Salomon for the value added that Salomon supplied to the transaction by committing its capital to finance the acquisition as principal as well as the particular risks Salomon undertook in acting as principal.

* * *

11. Salomon believed that the participation interests it was acquiring pursuant to its fee agreements with MOA were of substantial value. Thus:

(a) Prior to the time Salomon committed to finance MOA's acquisition of Portfolio I, Tom Arasi



and I prepared a memorandum dated July 21, 1987 addressed to Salomon's Real Estate Screening Committee to seek the approval of that committee for Salomon's commitment as principal of approximately $70 million of Salomon's funds to finance MOA's acquisition of Portfolio I (I understand this memorandum has been designated APT Ex. 905). As indicated in Section C of that memorandum, we estimated the value of Salomon's participation interest in Portfolio I to be approximately $6.5 million.

(b) I am aware of the allocation agreement between Motels of America and Salomon which I was asked about at my deposition (I understand this allocation agreement has been designated PX 239). As I indicated at my deposition, this allocation agreement was prepared by attorneys for MOA and Salomon to deal with a technical tax issue (see page 856, lines 22-25). Unlike the $6.5 million valuation in our July 21, 1987 memorandum to Salomon's Real Estate Screening Committee, this allocation agreement between MOA and Salomon did <u>not</u> represent our assessment of the economic value of the first participation interest.

(c) Prior to the time Salomon committed to finance MOA's acquisition of Portfolio II, Jay Ahrens, J. Christopher Dorian and I prepared a memorandum dated March 3, 1988 addressed to Salomon's Real Estate Capital Commitments Committee to seek the approval of that committee for Salomon's commitment as principal of approximately $23 million of Salomon's funds to finance MOA's acquisition of Portfolio II (I understand this memorandum has been designated APT Ex. 906). As indicated in Section H(4) of this memorandum, we

estimated the value of Salomon's participation interest in Portfolio II to be approximately $2.5 million.

(d) Prior to the time Salomon committed to finance MOA's acquisition of Portfolio III, J. Christopher Dorian, Kristen Klingbeil-Weis, Tracey Thatcher, Hugh Nickola and I prepared a memorandum dated August 1, 1989 to Salomon's Real Estate Capital Commitments Committee to seek the approval of that committee for Salomon's commitment as principal of approximately $63 million of Salomon's funds to finance MOA's acquisition of Portfolio III (I understand this memorandum has been designated as PX 154). As indicated in Section H(5) of this memorandum, we estimated the value of Salomon's participation interest in MOA Portfolio III to be approximately $12.7 million. As I testified in response to Mr. Jackson's question at my deposition, in November 1989 I continued to believe the potential return from the Portfolio III participation interest could approximate this number (pages 1294-95). This likewise was my belief in December 1989.

12. Salomon's Real Estate Screening Committee (the relevant group in the 1987 time frame) and its Real Estate Capital Commitments Committee (the relevant group in 1988 and 1989) were comprised of senior Salomon executives from the real estate finance group and other areas of the firm. The Real Estate Screening Committee and the Real Estate Capital Commitments Committee gave their approvals for Salomon committing to finance MOA's acquisitions of Portfolios I, II and III, respectively. In co-authoring the memoranda to Salomon's Real Estate Screening Committee or Salomon's Real Estate Capital Commitments Committee referred to above, I in fact had the belief at the time I co-



authored these memoranda that Salomon's participation interests in the MOA portfolios had the approximate values specified in these memoranda.

13. In connection with the MOA Portfolio I transaction, Hospitality Valuation Services, Inc. ("HVS"), an independent real estate consulting and appraisal firm, was retained to appraise each of the Portfolio I properties. The aggregate of the appraised values of the 45 Portfolio I properties as of June 1, 1987 was approximately $95 million. HVS also projected cash flows for the MOA Portfolio I properties.

14. HVS did appraisals and projected cash flows for the 7 motels included in MOA Portfolio II. The aggregate of the appraised values of the 7 Portfolio II properties as of January 1, 1988 was approximately $31.2 million.

15. Kenneth Leventhal & Co. ("Leventhal"), an independent accounting firm with a specialized real estate consulting and appraisal practice, was retained to appraise each of the Portfolio III properties. The aggregate of the appraised values of the 17 Portfolio III properties as of August 1, 1989 was approximately $84.2 million. Leventhal also projected cash flows for the MOA Portfolio III properties.

16. HVS did appraisals and projected cash flows for the 9 motels included in the Best Inns portfolio. The aggregate of the appraised values of the 9 Best Inns motels as of September 1, 1988 was approximately $33.5 million.

17. Salomon would regularly review the performance of all of the portfolios of motels that Salomon had financed because from time-to-time Salomon bought or sold for its own account securities with respect to those portfolios in secondary market transactions and, in addition, from time-to-

time Salomon would own securities with respect to particular portfolios.

18. At no time did anyone tell me that Salomon had agreed to monitor the performance of any MOA portfolio or the Best Inns portfolio on behalf of Ameritech Pension Trust ("APT") or National Investment Services of America ("NISA"). At no time did I tell anyone from APT or NISA that Salomon would monitor any MOA portfolio or the Best Inns portfolio on behalf of APT or NISA. As I testified in my deposition (e.g., pages 455-457), on one occasion, in May 1990, I met with representatives of NISA and APT when I was traveling through Milwaukee, Wisconsin on my way to Madison, Wisconsin on other business. This was the type of informal meeting I would have from time-to-time with parties with whom Salomon transacted and meetings of this nature were a type of business promotion activity for Salomon. I did not attend this meeting because I had been told there was an agreement or understanding that Salomon would monitor APT's participation interest investments on behalf of APT.

* * *

20. I have already testified in my deposition concerning the breakfast meeting at the Town & Country Hotel on or about December 12, 1989 (pages 617-628). As I testified, I do not recall Ameritech being discussed at all during this meeting (pages 624, 626). If the subject of Ameritech did come up even in passing (and I do not recall that it did), I am quite confident that I did not make any statements to the effect that (i) the participation interests on Portfolios I and II did not matter to Ameritech, (ii) Salomon would "take them out" of those investments at "105" (or any other price) or (iii) Salomon could exercise a significant amount of control over Ameritech's investments. As I also testified, I do not recall Riedel or Livingston asking me at this meeting whether



MOA could contact Ameritech (page 625). I could not prevent MOA from contacting Ameritech even if I wanted to and, if they had asked such a question, I would not have told them that they could not contact Ameritech. Indeed, as I testified, my understanding was that MOA was regularly reporting financial information directly to Ameritech (page 1230) and on occasion MOA representatives had indicated to me that they may seek to talk to Ameritech about making additional investments in MOA (pages 624-625). Finally, I have no memory of any discussion at this breakfast meeting concerning the book Liar's Poker. If the subject had come up (and I do not recall that it did) I certainly would not have said that the book was "pretty much true" since I did not think it was.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Declaration of Steven J. Manolis, Managing Director of Salomon Brothers Inc, dated June 8, 1995**

(R. 151) (Excerpts)

* * *

1. During the period 1983 to 1991 I was a managing director of Salomon Brothers Inc and manager of its real estate product area. * * *

* * *

3. I have no recollection of any indication by either Mr. Phillips or Mr. Thompson in any introductory call that I made to them in connection with any of the participation interest transitions of even a possibility that there could be a prohibited transaction problem (or any other type of ERISA violation). I did not believe that the sales by Salomon of the four participation interests to APT were prohibited transactions in violation of ERISA. I did not believe that Salomon was a person providing services to APT or a party in interest of APT for purposes of ERISA or a fiduciary of APT.

* * *



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Declaration Of Gregory A. White, Managing Director Of Salomon Brothers Inc, dated June 12, 1995**

(R. 154) (Excerpts)

* * *

1. During the period 1987 through 1990 I was employed as a director and then as a managing director of Salomon Brothers Inc and worked in its real estate finance group.

* * *

3. I understand that plaintiffs have made the charge that at a meeting held on October 20, 1987 at Ameritech's office in Chicago I made an oral agreement with Mr. Thompson of Ameritech, and Messrs. Gorman and Bryden of NISA, that Salomon would monitor the participation interest investment on behalf of APT. However, at no time did I make any such agreement. I would also note the following points:

a. I did not attend any meeting in Ameritech's offices on October 20, 1987. Attached hereto as Exhibit A are excerpts from my expense report for October 1987 and attached hereto as Exhibit B are excerpts from my calendar for 1987 (October 20 appears on page SD1254). As is evident from my expense records and calendar, I was in New York all day on October 20, 1987. The meetings listed in my calendar for October 20 were all in New York, and included an 8 a.m. breakfast meeting, a 12:00 noon lunch meeting, a 4:30 p.m. meeting and a 7:30 p.m. dinner. As evidenced by the charge receipt attached to my expense records, I picked up the check for the

12:00 noon lunch meeting which was held at a restaurant in New York.

b. I note that when Mr. Gorman wrote to me on October 27, 1987 to "affirm" Mr. Thompson's agreement to purchase the first participation interest investment, Mr. Gorman made no mention of any supposed agreement by Salomon to monitor that investment for APT (see Thompson Ex. 18, page A15827, annexed hereto as Exhibit C).

c. The executed assignments for each of the four participation interests say nothing about any supposed agreement that Salomon would monitor these investments on behalf of APT (see, for example, Phillips Ex. 119, annexed hereto as Exhibit D).

4. As I previously testified, we had contacted Ameritech in the fall of 1987 for purposes of determining whether Ameritech had an interest in purchasing the participation interest investment in MOA Portfolio I in view of the interest in very high risk and potentially very high return investments for its pension fund that Ameritech had previously expressed to us at a meeting that was held in Salomon's offices in New York between people from Salomon and Ameritech after Mr. Thompson had joined Ameritech as director of real estate investments (see pages 90-96 of my deposition). I did not call Ameritech in order to attempt to sell the participation interest specifically for inclusion in any particular Ameritech pension fund portfolio; rather, I understood that if Ameritech wished to purchase the participation interest, Ameritech executives would decide how the investment would be handled within the Ameritech pension fund structure.

5. As I also previously testified (pages 107-108, 406-07), in my negotiations with Mr. Thompson concerning the sale of the first participation interest, Mr. Thompson asked



me if it would be possible for Salomon to retain a small portion of the investment. Mr. Thompson explained to me that it would be easier for him to have the investment approved if he could state that Salomon still had a continued economic interest in the participation. I responded that as far as I was concerned I didn't think Salomon would have a problem with that provided that the interest Salomon kept was not so large as to defeat Salomon's goal of selling the investment in the first place. Mr. Thompson suggested that Salomon retain a 5% interest and I told him I thought that would be acceptable.

6. Mr. Thompson and I negotiated the price for the 95% interest to be purchased by APT by taking the potential price we had negotiated for a 100% interest and multiplying that price by 95%. I viewed Salomon's investment in the remaining 5% interest as having a value of approximately 5% of the value of the entire fee agreement, which would be approximately $335,000 for the 5% interest. Salomon anticipated profiting from its investment in this remaining 5% interest. The same is true with respect to Salomon's investments in the 5% interests in the Portfolio III and Best Inns fee agreements not sold by Salomon.

7. In my dealings with representatives of APT, it was always clear to me, and in my view it was always clear to them, that I was representing Salomon's interests and acting on behalf of Salomon, and that I was not in any way purporting to represent or act on behalf of APT.

8. During my dealings with representatives of APT concerning the sales of the participation interests, no one representing APT ever suggested to me, either orally or in writing, that Salomon either was or even might be a fiduciary of APT; that Salomon either was or even might be a person providing services to APT or a party in interest of APT for purposes of ERISA; or that the sales by Salomon of the

participation interests to APT either were or even might be prohibited transactions in violation of ERISA. I did not believe that the sales by Salomon of the four participation interests to APT were prohibited transitions in violation of ERISA. Also, I did not believe that Salomon was a person providing services to APT or a party in interest of APT for purposes of ERISA or a fiduciary of APT.

9. At the time of the participation interest transactions no one representing APT ever stated or suggested that NISA was breaching a fiduciary duty to APT in connection with these transactions and at no time did I conclude that NISA was breaching a fiduciary duty to APT.

* * *



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Jeffrey Bryden, Vice President of NISA, December 8, 1993**

(R. 243: Deposition Binder Vol. 1, Tab 3) (Excerpts)*

* * *

**[152:19-155:4]**

Q. Do you recall anyone using the term "monitor" during the course of the meeting?

MR. HANSEN: That exact word or the concept?

MR. HEIN:

Q. That word.
A. Yes, I do.
Q. What do you recall being said in that regard?
A. Well, as we were relating, as Mr. Gorman was talking about keeping Salomon in the deal, there was extensive discussions about Salomon taking a lead role in this, since they were the ones who had really structured this

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* [Record No. 243 consists of three boxes containing publicly filed deposition and exhibit excerpts. The parties submitted these materials on the May 1995 cross-motions for summary judgment that were the subject of the district court's June 1996 decision and order, which was reversed by the Seventh Circuit in the decision below insofar as the district court had declined to dismiss Count II. The parties originally filed the Record No. 243 materials in or about April 1996. In connection with preparing the record on appeal for the Seventh Circuit, it became apparent that the Record No. 243 materials were not readily locatable in the district court's files. Thus, in April 1998, the three boxes now docketed at Record No. 243 were refiled. On June 26, 1998, the district court entered an order formally granting permission to refile the three boxes (R. 245).]

from day one, understood the language, understood this entire Fee Agreement and how it was operating; that they would take a lead and monitor specifically the financial information, because the cash flow was based on being able to understand and go through financial statements; and there was some specific language in terms of revenue, expenses, less certain things.

There was a specific lineup of things after which any excess income would be used in this 35 percent interest. And the word -- the word "monitor" was used very much, so that Salomon would act in that, monitor, collect information, go through it. So through all the accounting and assure that this -- any cash flow calculation were being done as originally expected and outlined.

Q. Do you recall any particular person using the specific word "monitor"? That specific word.

MR. HANSEN: Are you asking whose mouth did it come out of, as opposed to did he hear the term used?

MR. HEIN:

Q. Did you actually hear someone use that term?
A. I recall the word "monitor" being used at the meeting, definitely.
Q. Do you recall the specific person who used that term?
A. Mr. Gorman used the term.
Q. Do you recall any specific statement by Mr. White on the subject of monitor?
A. Statements were -- I guess there would be -- More that Mr. White did not take exception to them being in the deal and monitor; and when this was discussed, seemed to accept that position and role going forward without -- you know, did not raise any concern about it.



Q. I take it today that you don't recall what specific statement Mr. White made in that regard at the meeting?

MR. JACKSON: Object to the form of that question. It's misleading and contrary to his prior testimony and suggestive.

MR. HANSEN: Do you remember the words or the substance of the words?

THE WITNESS: No. As I say, I don't recall specific words, but I do recall when discussing it, that he did not react negatively or it wasn't a cause of concern. That he was agreeable to that.

**[190:1-18]**

Q. Was it your understanding that Mr. Thompson of Ameritech or someone at Ameritech working with Mr. Thompson was going to play some role in monitoring these participation interest investments?

MR. JACKSON: Object. Foundation.

MR. HANSEN: Do you understand the question?

THE WITNESS: No, could you read it back, please?

(Question read aloud by the Reporter.)

THE WITNESS: Yes.

MR. HEIN:

Q. And what was your understanding in that regard?
A. Like you said, that financial information was going to Mr. Thompson, who reviewed that as outlined in our original meeting in October of '87, that Mr. Thompson being a real estate expert understood it and would continue to monitor it and review it.

**[199:21-200:2]**

Q. As you understood it, as between Ameritech Pension Trust on the one hand and NISA on the other hand, did NISA have as part of its job or part of the services it

provided to Ameritech the job of monitoring the participation interest investments?

A. If by "monitoring" you mean to collect the cash flow along with other securities in the portfolio, yes.

**[421:22-423:7]**

Q. Do you recall at any point in time prior to the end of 1989 period checking or inquiring of Salomon Brothers with regard to the status of either the first or the second participation interest investments?

A. I'm sorry. Could you read that back again?

(Question read aloud by the Reporter.)

THE WITNESS: Not that I can specifically remember.

MR. HEIN:

Q. Do you have any memory of NISA, you or anyone else at NISA receiving any written report from Salomon Brothers on the status of the first and second participation interest investments at any point in time prior to this late 1989 period you've previously referenced?

A. Including that period?

Q. Up to that period. Up to late 1989.

MR. HANSEN: By "written reports," do you mean to include any documents that contain any information or relating to it, or are you talking about a separate report that summarizes in textual form information?

MR. HEIN:

Q. Let's start with the question in its broadest sense.

A. I apparently can't remember any specific instance.

Q. Do you recall any instance prior to this late 1989 period you've referenced before where you or someone else at NISA received an oral report on the status of Portfolio 1 or Portfolio 2?

A. Not that I can specifically remember.



Q. Do you recall any discussion with anyone at NISA to the effect of, "Why aren't we receiving written reports or oral reports or some other kind of report from Salomon on the status of Portfolio 1 or 2?"

A. Not that I can remember either way.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Kenneth F. Feld, Ameritech Manager, Private Investments, September 16, 1993**

(R. 243: Deposition Binder Vol. 1, Tab 12) (Excerpts)

**[5:14-15; 5:24-6:11]**

Q. When did you retire?
A: November of '90.
Q: What was your last position at Ameritech before you retired?
A: You mean title?
Q: Title.
A: Manager, private investments.
Q: Did you have any other titles or positions at the time that you retired?
A: No.
Q: When did you become manager, private investments at Ameritech?
A: Late '88, early '89, in that time period.

**[229:10-230:18]**

Q: And it was NISA's job, as you understood it, to monitor the participation interests in some way, given that they were the investment manager holding the account that held the participation interests, is that correct?
A: That's correct.
Q: Prior to the time that you wrote this memo, did anybody tell you that Salomon had agreed to monitor the participation interests on behalf of Ameritech or NISA?
A: No. I didn't even know they were there.



Q: Okay. I mean at the meeting in Milwaukee on May 21, did anyone tell you that Salomon had agreed to monitor the participation interests on behalf of Ameritech or NISA?
A: No.
Q: Okay. Subsequent to that meeting, after that meeting and leaving aside any conversations with counsel, did anyone ever tell you that Salomon had agreed to monitor the participation interests on behalf of Ameritech Pension Trust or NISA or Ameritech?
A: Not to my knowledge.
Q: And at that time that you wrote the May 24, 1990, memo to Mr. Malone, Feld Exhibit 50, no one ever told you that Salomon was monitoring the participation interests on behalf of Ameritech or NISA?
A: No.
Q: No one had ever told you that, is that correct?
A: No one. That is correct.

**[654:4-656:10]**

BY MR. CONWAY:

Q. At any time during the May 21, 1990, meeting at NISA, did anyone say anything about how or whether the Motels of America and Best Inns investments were being monitored?
A. I discussed that with Jeff Bryden, and I'm not sure if it was within that meeting. My recollection would be it was not within that meeting, but it – because, again, that would not have been a subject that Mr. Henry would have been involved in. That was a separate side discussion, but it was discussed, but my recollection would be not at that meeting.
Q. So it's your best recollection that the monitoring of the participation interests was not discussed in Mr. Henry's presence on May 21, 1990?

A. That's my recollection.
Q. I take it no one told you during the meeting that Salomon and Ameritech or NISA had agreed that Salomon would monitor the four investments, is that correct?
A. That's correct.
Q. No one told you that?
A. No one told me.
Q. And no one told you during this meeting that Ameritech had hired Salomon or that NISA had hired Salomon to monitor the participation interest?
A. No one told me anything in that regard.
Q. And did anyone ever tell you that? Did anyone ever tell you that – at any time, that Salomon and Ameritech or NISA had agreed that Salomon would monitor the Best Inns and Motels of America investments?
A. It was – as part of a discussion later, and maybe before that meeting with Bryden, I was told that NISA felt that they had – that Salomon was monitoring it, because they had an interest in it, but that was not an agreement or anything like that.
Q. Okay. So the answer to the question whether anyone ever told you that Salomon on the one hand and Ameritech or NISA on the other hand had agreed that Salomon would monitor the Motels of America and Best Inns investments, no one ever told you that, is that correct?
A. Not to my – no, I don't recall anybody ever saying that.
Q. And is it correct that no one at any time ever told you that Ameritech or NISA was paying a fee or other compensation to Salomon Brothers in exchange for monitoring the Motels of America or Best Inns investments?
A. To my knowledge, there was no fee. It was never discussed with me.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Joseph E. Gorman, President, CEO and Director of NISA, November 30, 1993, March 24, 1994**

(R. 243) (Sal. C.A. App. 588-618, at 589, 590, 591, 594, 611) (Excerpts)

**[36:13-19 (Sal. C.A. App. 589)]**

Q. Am I correct that during the period 1987 through 1989, you were president, CEO and director of NISA?

A. Yes.

Q. Generally, what was the nature of your responsibilities in that capacity at the time?

A. They are pretty much contained in the title: President, chief executive officer and director.

**[53:15-54:3 (Sal. C.A. App. 590)]**

Q. Did you or NISA, to the best of your knowledge, act improperly or violate ERISA in connection with the participation interest investments?

A. No. To my knowledge, no.

Q. To your knowledge, did Thompson or Don Phillips -- Tom Thompson or Don Phillips of Ameritech act improperly or in violation of ERISA in connection with the participation interest investments?

A. Not to my knowledge.

Q. To the best of your knowledge, did Salomon act improperly in connection with the participation interest investments?

A. Two answers. It's been questioned, and - But to the best of my knowledge, no.

**[55:19-24 (Sal. C.A. App. 591)]**

Q. When, as you recall it, did someone from Ameritech first question whether Salomon had acted improperly or in violation of ERISA in connection with the participation interest investment?

A. Probably the first meeting after the notice of bankruptcy.

**[124:23-125:7; 126:3-24 (Sal. C.A. App. 594)]**

Q. At the time the transactions were entered into, the purchase of the participation interest in the Motels of America and Best Inn's fee agreements by NISA for APT, did you believe that those transactions were prohibited transactions under ERISA for which no exemption was available?

A. No.

MR. JACKSON: The answer?
THE WITNESS: No. That is no, I did not believe they were prohibited.

Q. * * *

This is the pleading that is the current operative pleading that Ameritech has filed against Salomon in this case.

And the second sentence of Paragraph 76 states, "Salomon knowingly participated



in NISA's fiduciary breaches by selling interests in Fee Agreements 1 through 4 to NISA for APT's dedicated bond portfolio."

And my question of you is whether, to your knowledge, NISA committed any breach of fiduciary duty by purchasing the interests in the Motels of America or Best Inns' Fee Agreements, which are referred to here as Fee Agreements 1 through 4?

A. My answer is I don't know how to define fiduciary breaches in any sense that gets into legal or judgmental about the facts of this or not. But that we did not knowingly breach any fiduciary duty.

**[764:25-765:4; 765:10; 765:18-22; 766:11 (Sal. C.A. App. 611)]**

Q. Okay. To your knowledge, Mr. Gorman, did NISA ever identify Salomon Brothers to either Harris Trust or to Ameritech as being a fiduciary or a party in interest of Ameritech Pension Trust at any point in time prior to 1990?

THE WITNESS: To my knowledge, no.

Q. To your knowledge, at any point from January 1, 1990, to the present, has NISA identified Salomon to Harris Trust or to Ameritech as being a fiduciary or party in interest of the Ameritech Pension Trust?

THE WITNESS: Not as I recall.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Joseph E. Gorman, President, CEO and Director of NISA, November 30, 1993, December 1, 1993, March 24, 1994**

(R. 243: Deposition Binder Vol. 2, Tab 17) (Excerpts)

**[116:1-4]**

Q. Were there other investments that were made where Ameritech, in effect, proposed the investment for NISA's consideration?
A. Yes.

**[116:14-16]**

Q. Would that include the Motels of America and Best Inns' investments?
A. Yes.

**[131:5-132:1]**

Q. Did NISA have the sole responsibility for the decision to purchase interests in the Motels of America and Best Inns' Fee Agreements that were purchased for APT's dedicated portfolio?
A. There's been a lot of whittling to get to a question that's still very difficult to answer. Much as Scott says, I don't understand what "sole responsibility" means in all instances.

So I can easily answer the question - the question that he rephrased, which is, could we have said no? Yes, we could have said no.



So in that respect, we could have unilaterally said no to the investment. In making the investment, we relied upon the advice, the information and the investment expertise of people other than ourselves in the area of real estate and in the area of motels and hotel properties and in the area of appraising them and pricing them. So we did rely upon other parties' expertise. We did rely on other parties' information. But could we have said no? Yes, we could have said no. We chose to say yes to the investment.

**[132:8-25]**

Q. Did you rely in part on the expertise of Mr. Thompson of Ameritech in making the Motels of America, Best Inns' investments?

MR. JACKSON: Object to the form.
THE WITNESS: Yes.
MR. HEIN:

Q. With respect to each of the four investments, each of the four Motels of America and Best Inns' investments, had the initiation or proposal that the investment be made in the dedicated portfolio come from Ameritech?
A. Please reread it.

(Question read aloud by the Reporter.)

MR. HANSEN: Do you mean by that, whether it came – was brought to his attention by someone from Ameritech?

MR. HEIN: Yes, that's correct.
THE WITNESS: Yes.

**[136:14-137:12]**

Q. In the second, third and fourth participation interest transactions, who on behalf of Ameritech or APT actually negotiated the price with someone at Salomon?
A. To the best of my knowledge, it was – Well, I guess I should say I don't know. I assume it was Thompson, but it may have been Thompson and Phillips.
Q. In connection with the first participation interest transaction, who negotiated the price with Salomon?
A. Well, it depends on what all you conclude in the negotiation, I guess. We had a hand in it. There was work done on it before we arrived, before it was presented to us. In effect, we reviewed the work and accepted it. And then as I say, because of the retaining of a piece of it, it went back for final calculation between Thompson and Salomon.
Q. With respect to the first participation interest transaction, was it your understanding that there had been a back and forth, on the subject of price between Thompson and Salomon that NISA was not involved in?
MR. JACKSON: Object. Foundation.
THE WITNESS: Yes.

**[144:9-13]**

Q. Apart from checking the due diligence, was NISA in a functional sense, as you understood it, responsible for actually performing the due diligence on behalf of APT with respect to the purchase of the four participation interests?



**[145:3-146:4]**

THE WITNESS: When the idea of investing in real estate first surfaced, we explained to the staff of Ameritech that we had no real expertise to examine real estate-type investments.

When Mr. Thompson joined the staff of Ameritech, we were informed that he was the real estate expert; that Ameritech was going to develop a portfolio of real estate holdings through Mr. Thompson's auspices. That some of these might find their way into the dedicated portfolio, and that we should rely upon his expertise in this.

So that's what was – was agreed to; and when it came time, as we would turn to a Downs organization or some other organization that was an expert in real estate, we turned to Ameritech, Mr. Phillips and Tom Thompson.

MR. HEIN:
Q. With respect to the four participation interest investments, did NISA look to and rely on the real estate expertise of Mr. Thompson and Mr. Phillips of Ameritech for the evaluation of those investments?
MR. JACKSON: Object to the form.
MR. HANSEN: You mean rely on them to the exclusion of others, or rely on them in part?
MR. HEIN:
Q. Rely on them at least in part.
A. Yes.

**[159:20 - 161:12]**

Q. In relation to each of these four participation interest transactions, was it your understanding that Salomon Brothers was selling the investment to APT or proposing to sell the investment to APT?
A. Yes.

Q. And was it your understanding that NISA and APT were on the buyer's side of a proposed transaction, where Salomon was the seller and APT or NISA was proposed to be the buyer?
A. Yes.
Q. In each of the four participation interest transactions, was it your understanding that Salomon owned the participation interest it was attempting to sell?
A. Again, yes, I guess – Yes.
Q. In each of the four participation interest transactions, was it your understanding that Salomon Brothers, in attempting to make the sale, was acting for its own account?

MR. HANSEN: You mean solely for its own account to the exclusion of the interests of Ameritech?

MR. HEIN: For its own account in the sense it was selling an investment to obtain for itself the proceeds of the investment.

MR. HANSEN: Now if that's black and white, you can answer. If not, you can explain.

THE WITNESS: Maybe try reading it.

(Question read aloud by the Reporter.)

THE WITNESS: As I understand the question, I guess the answer would be yes, they were acting for their own account.

MR. HEIN:

Q. Did you complete your answer?
A. Yes.
Q. Was it your understanding in each of the four participation transactions, that the interest of Salomon as a seller and the interest of APT or NISA as the potential buyer were at odds with each other?

MR. JACKSON: Object, vague.

THE WITNESS: I guess I would have to say to an extent they were at odds with each other.



**[264:1-9]**

Q. Am I correct that since 1989, there has been a sharp correction in the real estate markets generally in the United States?

MR. JACKSON: Object. Foundation.

MR. HANSEN: I object to the form of the question. Vague.

THE WITNESS: Are you correct? If my understanding of the newspapers is correct, yes. That's correct.

**[328:8-12]**

Q. Are you aware of anything in writing created prior to November of 1990 that sets forth in writing any agreement by Salomon to monitor or provide oversight on behalf of NISA or APT?
A. Not that I can think of right now.

**[340:6-341:14]**

BY MR. HEIN:

Q. Mr. Gorman, do you recall at this meeting in Chicago Mr. White articulating any specific steps or procedures that Salomon would take to monitor the participation interest investment?
A. It would have been in response to our requests along the lines that I discussed before. I don't remember specifics.
Q. Did you have an understanding as of October 1987 of specific steps or procedures that Salomon would undertake going into the future in the course of monitoring the first participation interest?

MR. HANSEN: Do you understand what he means by specific steps?

A. I don't know how to answer it yes or no without saying they would have agreed to be -- to do the things that I mentioned in the earlier testimony.

MR. HEIN:

Q. Can you be any more specific than that in terms of what your understanding was as of the fall of 1987?

A. I had been before. I don't know that it will either be complete or exactly as I said before, but it would be that they would act as the lead banker, that they would follow the evolution of the company, check its performance out against the plan, would be a part of the group that oversaw the recalculation of value when a refinancing occurred or a sale or the termination of the agreement, that they would keep in mind their own interests and Ameritech's interests in that being favorable, that they would follow the company's cash flow projections, and see to it that they and we received our equitable share of the cash flow as conceived in the sharing agreement that they sold to us.

**[381:13-19]**

Q. Were you generally aware that the implementing or transactional documentation for the transaction was subsequent to the meeting you've described thereafter worked out between Thompson and Greg White of Salomon?

MR. JACKSON: Object to the form.

A. I would assume that it was. I don't recall the period or discussion relating to it.

**[519:10-25]**

Q. Do you have any memory at all of the second transaction being presented to NISA as a fait accompli in effect with



Ameritech asking NISA to sign off on it, as distinct from NISA being approached at the very inception of the discussions with Salomon on the second transaction and then participating in some dialogue? Do you recall one way or the other which circumstance if either of those eventuated here?

MR. JACKSON: Object to the form and foundation.

A. You'll simply have to recall that we looked upon Ameritech and their staff as the experts in the real estate side of things. It wouldn't have been necessary that we were involved from the inception. They would have turned to us and made a case for the investment. We would have decided one way or another whether the investment was going to be made.

**[527:3-16]**

Q. Did Mr. Thompson from time to time forward to you copies of financial statements that he received from Motels of America?

A. Not as we would have expected them. At some point he began to forward financial statements. We expected them from the beginning. We got them later on in the process, and again I don't recall when.

Q. And when you say that Thompson did not do this as you would have expected, what are you referring to?

A. Forwarding cash flows as -- or financial statements as he received them.

Q. And why did you have that expectation.

A. We expected to be informed to keep our files up-to-date, et cetera.

**[564:24-565:6]**

Q. Did you and Mr. Bryden, to your knowledge, attempt with respect to the third and fourth participation interest investments to review yourselves the projections with respect to future performance that were being provided?
A. I've said before, I don't recall the specifics. In general, we relied upon the work that Mr. Thompson did to assess the value and compatibility and so forth of the properties.

**[581:15-583:18]**

Q. Mr. Gorman, you previously have testified to your recollection of a personal meeting with Greg White at Ameritech's offices, which you identified as October 20, 1987, based on your calendar entry. Let me direct your attention to two documents that have been marked as Bryden Exhibits 332 and Bryden Exhibit 333. Let me just represent to you, Mr. Gorman, what these are.

Exhibit 333 is Greg White's calendar, and if one will turn to Page SD1254 page with October 20, 1987, I will represent to you that Mr. White has certain events scheduled here: Breakfast, lunch, and then commitments in the afternoon and evening on October 20th, all of which were in New York, and he has a note, "call Ameritech."

Exhibit 332 is from Mr. White's expense records, and your copy may be a little difficult; but I will represent to you that the first entry is dated October 20th, refers to a lunch with Mason Ross, which corresponds to the noon lunch with Mason Ross on Mr. White's calendar for October 20, 1987.

Then attached is the credit card receipt for that lunch, which also is dated October 20, 1987, for Delmonico's, a restaurant in New York. My question is: Based on the fact that Mr. White's calendar and his expense records



place him in New York, including at a lunch in New York on October 20, 1987, is it possible that your memory that he was personally present with you at a meeting in Chicago that same day is mistaken?
A. The possibility would be there. I suppose that some other Salomon representative was at the meeting. There's no possibility – and that in some way the names were confused. That's at least an open possibility at this time. There was a Salomon representative there who was representing the real estate proposal, and there's no confusion about that. I could probably not identify Greg White today if he showed up in front of me, so –
Q. What you're saying is you cannot say with certainty that it was Mr. White as opposed to some other Salomon person at this meeting on October 20th that you previously testified to?
A. Yes. As far as I'm concerned, the name Greg White was a reconstruction because he was tied into the records we had.
Q. By "reconstruction," you're referring to the reconstruction that you and Mr. Bryden did in the fall of 1990; is that correct?
A. That's correct.

**[594:8-12]**

Q. Mr. Gorman, with respect to the purchases of each of the four participation interests, was NISA's role or did NISA play the role of a skeptical buyer?
A. I would say they certainly tried to be, yes.

**[715:1-12]**

(Deposition Exhibit No. 359 was marked for identification by the Court Reporter.)

MR. HEIN:

Q. Let me direct you to the second page through the end of the document, beginning 48949 through 51. It's the portion that follows the cover letter and begins NISA 48949 through 51, a document you prepared?

A. Yes.

Q. Did you prepare this document in the regular course of business at NISA?

A. Yes.

**[716:12-717:6]**

Q. Let me direct you specifically to Item 2 of the first paragraph. In Item 2, the – see the sentence, "The Ameritech staff felt the proposal, $8,565,000 in total," and says – this is what I want to focus on, -- "was too small to look at as a separate project, but too lucrative not to own."

Was that, in fact, said to you by representatives of Ameritech at the time of the first or second participation interest investments?

MR. JACKSON: Object to the form.

THE WITNESS: I mean, that's how I remembered it then without any attempt to be precise about it – about the way it was stated.

MR. HEIN:

Q. Who from Ameritech were you referring to with your use of the word "Ameritech staff" in this sentence?

A. Probably Don Phillips.



**[736:1-16]**

Q. At some point in time, Mr. Thompson was hired, and you were advised of that; is that correct?

A. That's correct.

Q. Do you recall any comments by Mr. Phillips or anyone else at Ameritech as it relates to the fact that Thompson had now been employed in connection with this – in connection with this concept of bringing things in-house?

MR. JACKSON: Object to the form.

THE WITNESS: Not specifically in that direction. There were – There were comments to the effect that Ameritech now had a real estate specialist, and that they were going to build upon that; and that they would begin, and I believe they did begin to look at very large projects in the real estate area.

**[807:24-808:9]**

[Q.] As I understand it, there were certain assumptions made as to what the dedicated portfolio had to earn to pay the share of retirement benefits that it was being dedicated to cover; correct?

A. Yes.

Q. Am I correct that NISA, in managing the dedicated portfolio, had been able to enhance the return through a variety of different trading strategies; is that correct?

A. Yes.

**[809:6-21]**

Q. As far as you were concerned, when the investments in the four participation interests were made, was it this excess return component of the dedicated portfolio that

was being put into those participation interest investments?

MR. HANSEN: You mean some small portion of that?

MR. HEIN:

Q. Some portion of that, right.

A. Yes.

Q. So from your point of view as manager of the dedicated portfolio, you were not jeopardizing the ability to cover the stipulated payments to retirees by making these investments; is that correct?

A. That would be correct.

**[812:15-22]**

Q. Am I correct that any loss that was suffered by the dedicated portfolio on the participation interest investments simply reduced the amount of this excess profit that you alluded to before the break?

MR. JACKSON: Object to the form.

THE WITNESS: That's a way of looking at it, yes.

**[975:21-976:5]**

Q. From your perspective, was the making of these four investments approved by the responsible Ameritech executives in charge at the time?

MR. JACKSON: Object to the form. I object on foundation purposes.

THE WITNESS: I will need to hear it again, because I didn't get all of that, the substance of it.

(Question read aloud by the Reporter.)

THE WITNESS: Yes.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Mark T. Livingston, President of Motels of America, August 16, 1994**

(R. 243: Deposition Binder Vol. 3, Tab 28) (Excerpts)

**[6:16-18]**

Q: When did you first become employed as an employee of Motels of America?

A: Effective 1-1-90.

**[8:7-9]**

Q: What position did you assume on January 1st, 1990 with Motels of America?

A: President.

**[166:9-167:6, 167:23-168:11]**

Q: What I'd like you to do is tell me in words if you can remember, in substance if you cannot remember the exact words, what was discussed at the meeting and by whom.

A: Let's see. As I recall, the meeting was called in part to introduce myself to Chuck [Henry] in part, to discuss the performance of the properties in part because of the convenience of the fact that they were here all the way from New York on another matter, but you know, wanted to stay, you know, tuned in to our operating performance and staying in close contact as they had.

So the breakfast meeting there was some discussion regarding the performance of the various portfolios.

There was some discussion regarding this — the

remainder interest in one of the portfolios. I don't remember which one it was. It wasn't Portfolio III. It was one of the other two.

* * *

And then we were talking – And I'm not sure in terms of the exact sequence of the events here, but we were talking about distributions on one of these portfolios, and the fact that the investors were not going to get what they were expecting, and Chuck making a comment that it wasn't relative – and it was relative to Ameritech, that it was very small. It was a very small investment for Ameritech, and that it really didn't matter. We'll just take them out at 105, which was, you know, we'll take them out at 5 percent over what they had invested.

**[175:16-176:6]**

BY MR. JACKSON:

Q. Do you recall whether or not there was any discussion at this meeting about a sale of any part of the Cricket fee participation interest to the Ameritech Pension Trust?

A. Not specifically, no.

Q. Did you have any information from any source at the time of this Town & Country meeting that Salomon was discussing with Ameritech Pension Trust the possible sale of the Cricket fee interest to Ameritech Pension Trust?

A. I'm assuming you're referring to what hasn't been sold at this point in time, which is Portfolio III?

Q. Yes.

A. Not that I can recall.



**[180:12-16]**

Q. Okay, I'm going to show you what's been marked as Thompson Exhibit-37. It's a December 22, 1989 letter to Motels of America, and it's addressed to Guy Hatfield.

And if you'll look at the second page, you'll see that – Is that your signature?

A. Oh, yes.

**[181:14-16]**

Q. Do you remember whether there was any delay in your receipt of this document?

A. Not off the top of my head, no.

**[182:2-183:8]**

Q: Do you remember whether there was any discussion regarding the assignment of the 95 percent interest of Salomon to the Ameritech Pension Trust?

A: There was some discussion, but I don't remember exactly what was discussed.

Q. Can you separate — Geoff Rich was general counsel?

A. Yes.

Q. Can you separate in your mind discussions outside of the presence of Geoff Rich but still within Motels of America?

A. I mean, any discussions with Geoff Rich would have just been very perfunctory with respect to what the document is.

Q. I am not going to ask you what he told you because I'm going to respect the attorney/client privilege between MOA's lawyer and you as an executive for Motels of America.

What I'm trying to figure out is, do you remember any discussions outside of the presence of Geoff Rich about this document?

A. About this document specifically?

Q. Yeah, or the event of the assignment of the fee interest.

A. The event of the assignment —
MR. HEIN: Object to the form.
THE WITNESS: I don't — I mean. I know we had — I know the discussions had come up. I couldn't tell you exactly when some of them were.

**[183:10-184:10]**

Q: What discussions -- With what people are you remembering discussions?

A: I vaguely remember -- I don't remember whether it was with -- Judy and Carl were involved in it, but Chap and -- and I can't remember whether, you know, Guy or Mike, but it wasn't one discussion.

I mean, it's not like we had one discussion and it was never brought up again. I mean, there was several discussions relating to the value of the participation interests, and in my -- my read on it was -- and my discussion and the opinions that I personally expressed in those discussions related to being somewhat incredulous, I think, at what was being sold. I mean, it was kind of like selling air, in my opinion.

Q: Why did you feel that way?
MR. HEIN: Object to the form.
THE WITNESS: I had a very hard time understanding how somebody could risk that much money for such a low and maybe no rate of return. And, you know, that's my personal opinion expressed, but I wasn't the only one that expressed it.



**[185:6-17]**

Q. Did you have the viewpoints you've just expressed at the time you signed the assignment of the fee interest in the third portfolio, which is Thompson Exhibit-37?
MR. HEIN: Object to the form of the question.

You're not putting before Mr. Livingston the documents that would tend to suggest when MOA received it. Also otherwise object to the form.
THE WITNESS: I don't recall specifically.

**[573:6-17]**

Q: At the time you came in as president, you thought that the imbalance between supply and demand with, more supply coming on line, would not be as severe as it turned out to be; is that correct?

A: That's correct.

Q: And as of the time you came in as president of Motels of America, you thought that if the operational issues of Motels of America were addressed, Motels of America could be successful; is that correct?

A: That's correct.

**[579:12-23]**

Q: It's kind of the first full paragraph beginning two-thirds of the way down, the second column it says, quote, the economy limited-services lodging section is still considered healthy, close quote.

The question is whether that was your understanding of the lodging market for economy limited-service motels as of the end of 1989?

MR. JACKSON: Object to the form.

THE WITNESS: Yeah. I'd say in general – pretty much in general.

**[581:4-582:8]**

Q: Do you recall whether as of January 1990 Motels of America's plans for the Cricket Inn future were for growth?
A: I think I answered that before. The answer was that there was some – they had two different scenarios, that I recall. One was growing through franchise, and the other was growing through development.
Q: As of early 1990 – let me just focus you. You referred, in page 66 of your deposition, to Mr. Riedel's thought that the Cricket Inns could be expanded into a viable regional franchise.
Do you see that?
A: 66?
Q: Right. It's lines 17 and 18.
A: Uh-huh. Yes.
Q: Was that still Mr. Riedel's view, as you understood it, as of early 1990?
A: I believe so.
Q: Did Mr. Riedel continue to work on potential development plans for the Cricket Inns in early 1990?
A: I believe so.
Q: Was it Mr. Riedel's intention as of early 1990 to attempt to obtain new financing to build new Cricket Inns?
MR. JACKSON: Object to the form.
THE WITNESS: I believe so.

**[587:17-588:10]**

Q: You referred to getting the owners and the management team on the same page. As of the time you came in as president, in January of 1990, do you believe there was steps that you could take, obviously with others, that could further this objective or goal of getting everybody on the same page?



A: Yeah.
Q: And as of the time you came in as president in January of 1990, were you optimistic or hopeful that you could accomplish that objective?
MR. JACKSON: Object to the form.
THE WITNESS: Yes, I was. A challenge, but I – I thought a lot about the risk and accepted that challenge with optimism that we would be able – that we would be able to be successful.

**[590:20-592:3]**

Q: But the bottom line – as of December 14th, 1989, the conversation with your dad that you recounted is that your bottom line was that you believed that Motels of America could be successful?
MR. JACKSON: I object based upon his prior testimony and the context in which it was given.
THE WITNESS: Yeah. I believed – you know, I believed that we had an opportunity to be successful. It was worth taking the risk.
BY MR. HEIN:
Q: Did you believe there'd be a reward if you were successful?
A: Well, actually from my perspective, it was very successful. And as I previously mentioned to you, there was some information that I wanted to be able to keep, and that information related to the performance of the properties subsequent to the implementation of the program that I described to you. And it was very dramatic improvements in many of the properties. Within 30 to 60 days subsequent to implementing the program, training the managers in the particular regions, and then taking the program back to the properties at a point, where I think I also mentioned before, with this

card, you could have gone to any room attendant or front desk person and asked them what the purpose of the company was, and what their role was and how it tied into that, and I think that was very powerful.

**[619:10-15]**

Q: As of January 1990, did you have a sense of optimism about the future of Motels of America?
A: I felt that I had an opportunity to make an impact and that the company could have a good future.

**[620:5-621:24]**

Q: Do you recall any discussion in connection with your becoming president about one of your focuses and responsibilities being efforts to better control expenses?
A: That was definitely a part of our discussion.
Q: As of January 1990, did you believe you could have a positive impact in better controlling expenses at Motels of America?
A: Yes.
Q: You've testified about your goal or concept of reducing centralized management in San Diego and putting management out into the field. Do you recall that generally?
A: Yes.
Q: As of January 1990, did you plan to establish regional management in field locations for the Cricket Inns?
A: Not as of January '90, no.
Q: Conceptually as of January 1990, did you have decentralization and the establishment of regional management in mind as a concept?



A: I can't – it's been so long ago, I can't tell you exactly when I had solidified my concept.
Q: At some point in time, you did determine conceptually that it would be better to decentralize management; is that correct?
A: Yes.
Q: And when you determined it would be better to decentralize management, was that judgment relative to the Cricket Inns as well as the other portfolios?
A: Yes.
Q: And did you believe that decentralization of management would improve the performance of the Cricket Inns.
A: Absolutely.
Q: Did you implement plans to decentralize management for the Cricket Inns?
A: Yes.
Q: Did that, in fact, improve performance?
A: Yes, it did. It was –

**[640:18-21]**

Q: Had you personally anticipated the severity of the decline in the lodging market that occurred in 1990?
A: No.

**[648:6-12]**

Q: Do you recall any occasion on which you or someone in your presence stated to someone from Salomon prior to July of 1990 that Motels of America would not be able to service the Portfolio III debt?
MR. JACKSON: Object to the form.
THE WITNESS: Not specifically, no.

**[649:17-650:8]**

Q: Let me direct your attention now to the breakfast meeting at the Town & Country in December of 1989 that you've given prior testimony about. Did you make any written notes at that breakfast meeting?
A: No, I did not.
Q: To your knowledge, did Mr. Riedel make any written notes at that breakfast meeting?
A: I don't recall.
Q: Do you recall making any notes of what was said at the breakfast meeting following the meeting?
A: I don't recall.
Q: Do you know if Mr. Reidel made any notes following the meeting?
A: I don't recall.

**[658:19-659:11]**

Q: Do you recall — even if you can't recall a specific, do you recall generally whether anything optimistic or positive or hopeful, even in the slightest bit, was said at the meeting?

MR. JACKSON: Object to the form.

THE WITNESS: I'm certain there was, but I'm — not specifically.

BY MR. HEIN:

Q: Why are you certain there was, even though you don't recall specifics?
A: Because, as I stated before, Mr. Riedel is very optimistic and would look at the opportunity that he sees — and myself as well, looking at, you know, what can we manage? What can we impact? How can we make a difference? How can we improve?



**[769:6-13]**

Q: Do you recall either you or Mr. Riedel telling Mr. Henry at the Town & Country meeting that you, Mark Livingston, had been brought in for the purpose of giving Motels of America firmer control on operations, among other things?
A: Very likely, but I don't specifically recall.

**[770:11-16]**

Q: Did you or Mr. Riedel tell Mr. Henry at the Town & Country meeting that one job that you would have would be to attempt to better control expenses?
A: Highly likely, but I don't recall that specifically.

**[777:16-778:2]**

Q: Did you or Mr. Riedel make any express statement at the Town & Country meeting about the amount of the distributions expected for Portfolio I?
A: You know, with this time, I just vaguely remember discussing the subject, that's it.
Q: Do you recall you or Mr. Riedel making any express statement about the amount of distributions expected for Portfolio II?
A: Same answer.

**[801:8-803:9]**

[Q:] If you look at the total room sales lines, am I correct in terms of my reading of this statement that the actual total room sales for Portfolio I for the month of

October 1989 itself were greater than the room sales in the prior month, the year before the October 1988?

A: Yes.

Q: Likewise, am I correct that in the categories departmental income, gross operating profit and net cash flow performance in October of 1989 for Portfolio I had been better than the year before, October 1988?

A: Yes.

Q: If you will turn to Livingston Exhibit 521, again just to be sure we are on the same wavelength in terms of our reading of these statements, am I correct that performance for Portfolio I in November of 1989 had been better than performance the year earlier in November of 1988 in the categories of total room sales, departmental income, gross operating profit and net cash flow?

A: It certainly appears that way.

Q: Would it be fair to say looking at performance of Portfolio I in October and November of 1989 as compared to the performance a year earlier, that the performance would appear to be stabilizing in relation to the prior year's performance?

MR JACKSON: I object. That is a grossly unfair question. It is also misleading.

THE WITNESS: I am not sure what you mean by "stabilizing," but they do appear to be doing well relative to the prior year.

BY MR. HEIN:

Q: I am now going to direct you back to Livingston Exhibit 517 which was looked at previously. This is a Portfolio II statement for October of 1989.

Again, just looking at the month of October of 1989 in the categories total room sales, departmental income, gross operating profit, and net cash flow, am I correct that the performance for Portfolio II in October of 1989 had been better than a year earlier?



A: Yes.

Q: Would it be fair to characterize these results for Portfolio II as being good in relation to the prior year?

A: I think so.

**[804:17-805:4]**

Q: Do you recall a specific statement by yourself at the Town & Country meeting to the effect that there would be no distribution to Salomon Brothers for Portfolio III?

A: Specific statement — I don't recall.

Q: Do you recall a specific statement by Mr. Riedel at the Town & Country meeting that there would be no distributions to Salomon Brothers for Portfolio III?

A: I don't recall specific statements at this time.

**[811:18-813:12]**

Q: Let me direct you to APT Exhibit 306 which you previously have been shown by Mr. Jackson. The first page is a transmittal by Mr. Hatfield back to Mr. White on January 30th, 1990 of a signed direction letter regarding Portfolio III and I believe you've previously been shown, as per the last page, that you signed the document.

A: And I signed the document?

Q: Is that correct, that you signed the last page of a direction letter page MOA14563?

A: Yes. The thing that is puzzling me, okay, this is January 30th.

Q: Yes.

A: Yes, that is my signature.

Q: At the time that you signed this direction letter, presumably at the end of January 1990, did you write to

Mr. Henry or Mr. White or anyone at Salomon to state that there would be no cash flow on Portfolio III?

A: Not to my knowledge.

Q: To your knowledge, did anyone at Motels of America at the time this letter was signed in January of 1990 write to Salomon to state that there would be no cash flow on Portfolio III?

A: I'm not aware of anything specifically, no.

Q: You recall I showed you that Mr. Riedel had written to Mr. Thompson on January 15th, 1990, I believe that is Riedel Exhibit 98. Do you recall having seen that just a short while ago here this afternoon?

A: Right here. Yes.

Q: To your knowledge, did anyone at Motels of America, at or about the time that you signed the direction letter for Portfolio III in January of 1990, write or communicate to Ameritech to say there would be no cash flow on Portfolio III?

A: I don't recall all the circumstances surrounding that. Chap Riedel is a better person to ask.

**[879:13-17]**

Q: Prior to this July 9, 1990 letter, are you aware of any written communication to Salomon Brothers stating that Portfolio III would not be able to make debt service?

A: Not that I can recall.



**[935:19-936:11]**

Q: Mr. Jackson referred you to APT Exhibit 300. The minutes of the November 10, 1989 meeting.
Mr. Jackson referred you to the statement by Mr. Riedel November 10, 1989 results of operations to date are mostly as expected.

A: Yes.

Q: Am I correct you don't know one way or another what expectations Mr. Riedel is referring to there; do you?

A: I will tell you, I said this before, Mr. Riedel is very optimistic. The glass is always half full, it doesn't matter if it is a quarter full. He is a very, very optimistic individual. In a board of directors setting I think he would paint the most optimistic light on it. That is my two cents on that one.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Donald W. Phillips, Chief Investment Officer of Ameritech Corporation, September 20-21, 1993**

(R. 243) (Sal. C.A. App. 631-650, at 632, 635, 638, 639) (Excerpts)

**[6:13-23 (Sal. C.A. App. 632)]**

Q. Were you employed by Ameritech Corporation or Ameritech Pension Trust or by both during the period 1987 through early 1990?

A. It was always my understanding that I was employed by the corporation in that period of time.

Q. And what was your position with Ameritech Corporation during that period?

A. I started out as the director of investment management and the title was later changed to chief investment officer.

**[30:9-31:6 (Sal. C.A. App. 635)]**

Q. To the best of your knowledge, did you act improperly or in violation of ERISA in connection with the participation interest investments?

A. I have never in my life acted in violation of ERISA or other than in the best interests of the pension fund.

Q. To the best of your knowledge, did Tom Thompson act improperly or in violation of



ERISA in connection with the participation interest investments?

A. He did not.

Q. To the best of your knowledge, did NISA act improperly or in violation of ERISA in connection with the participation interest investments?

A. They did not.

Q. To the best of your knowledge, did Salomon act improperly or in violation of ERISA in connection with the participation interest investments?

A. They did not.

**[47:7-10; 47:22-48:15 (Sal. C.A. App. 638)]**

Q. During the period 1987 through 1989, did you believe that APT's purchases of these participation interests were transactions involving a party in interest that were prohibited by ERISA?

* * *

A. To the best of my knowledge, there was no party in interest transaction.

* * *

Q. To the best of your knowledge in the 1987 through 1989 period, was Salomon Brothers a party in interest of APT?

A. To the best of my knowledge, no they were not.

Q. At the time you were employed by Ameritech Corporation, did anyone ever tell you that

they had any issue or concern about whether Salomon was a party in interest?

A. No.

Q. Did anyone ever tell you that they had an issue or concern about whether the participation interest transactions were prohi l transactions with a party in interest?

A. No. That was never brought up.

**[68:16-69:10 (Sal. C.A. App. 639)]**

Q. Was it your understanding that Salomon in the potential or proposed sale of the participation interest was representing Salomon's own interest?

A. Yes.

Q. And was it your understanding that Salomon Brothers was not purporting to represent APT's interest?

A. Yes.

Q. Was it your understanding that Salomon was purporting to advise APT on what price APT should pay?

A. No.

Q. Did you understand that the interests of Salomon as the potential seller and the interests of APT as the potential buyer were at odds with each other?

A. Yes. Any time you have a seller and a buyer they each have different objectives.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Donald W. Phillips, Chief Investment Officer of Ameritech Corporation, September 20, 1993**

(R. 243: Deposition Binder Vol. 4, Tab 39) (Excerpts)

**[31:7-14]**

Q. Subsequent to 1989, did the real estate industry generally suffer from declines in values?
A. Yes.
Q. And I understand what you said before about the special nature of hotels or motels, but did the hotel and motel industry likewise suffer from a decline in values subsequent to 1989?
A. Yes.

**[33:23-34:22]**

Q. Was the decline in values in the real estate sector that occurred after 1989 something that was generally foreseen or predicted prior to it occurring?
A. No.
Q. Specifically did you personally anticipate that decline in values before it happened?
A. I don't think anybody did and was able to accurately determine that.
Q. As you understand it, have numerous pension funds and other institutional investors lost money in real estate investments since 1989?
A. Yes.

Q. And as you understand it, have numerous pension funds and institutional investors lost money in investments in the hotel and motel sector since 1989?
A. Yes.
Q. Apart from the participation interest investments that are the subject of this lawsuit, do you know whether Ameritech Corporation or APT suffered losses on other real estate investments?
A. Yes, I'm sure that they have.

**[42:17-21]**

Q: Did Thompson or anyone else at Ameritech ever tell you that Salomon had agreed to monitor or manage any of the investments in any of the participation interests?
A: Not to my knowledge.

**[43:14-17]**

Q. Was it NISA's responsibility as you understood it to monitor those participation interests?
A. Yes.

**[48:16-49:11]**

Q. Who made the decision to purchase the participation interests as you understood it?
A. It was made at NISA. Who specifically I don't know whether that was Joe Gorman or whether that was a gentleman by the name of Jeff Bryden at the time. He was the specific portfolio manager on the account.
Q. Did you make the decision to purchase any of the participation interests?
A. No.



Q. Was the decision to purchase the participation interests as you understood it approved or ratified or confirmed by anyone at Ameritech Corporation?
A. No.
Q. Was the decision to purchase the participation interests required to be approved or ratified or confirmed by any individual or committee at Ameritech?
A. No.

**[92:10-18]**

Q. Okay. Was it your understanding that NISA would be monitoring the financial performance of these participation interest investments?
A. Yes.
Q. Did Mr. Manolis in the conversation you had with him state that Salomon would monitor the financial performance of the investment for Ameritech?
A. No.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Charles A. Riedel, Executive Vice President, Chief Financial Officer and Secretary of Motels Of America, April 23, 1993**

(R. 243: Deposition Binder Vol. 4, Tab 43) (Excerpts)

**[65:11-66:20]**

Q: Do you recall Mr. Thompson of Ameritech calling you at one time and asking you about a question about some financial statement?
A: I do remember a phone call from a Mr. Thompson, yes.
Q: And did you understand who he was representing?
A: Yes.
Q: And he was representing Ameritech?
A: That's what I understood, yes.

* * *

**[157:14-161:12]**

Q: Do you recall that at some point the subject of Salomon Brothers acting as principal and purchasing the notes for its own account as opposed to simply acting as placement agent came up?
A: Yes.
Q: And how did that come up?
A: I can't recall when or exactly how the conversation came up but it was part of how Chuck justified that they could take this participation because they were risking the firm's capital.
Q: Do you recall what he said in that regard?
A: Just what I said there; that they were risking their capital and they deserved a participation.



Q: Did Motels of America express a desire or need to have a firm commitment on the financing from Salomon Brothers as opposed to simply a best efforts undertaking to try to raise the money?
A: Yes.
Q: And when did Motels of America express that need for a firm commitment from Salomon?
A: I can't tell you a time.
Q: And why was it that Motels of America needed that firm commitment from Salomon?
A: We needed to be sure that the transaction was going to close because we were committing substantial funds towards the acquisition. If it didn't close we would lose those funds.
Q: Did it assist Motels of America in entering into an agreement to purchase the 45 Super 8s in Portfolio I that Motels of America was in a position where Salomon was committing to supply the capital as opposed to simply acting as agent to try to find buyers for the notes?

MR. HAMILTON: Would you read that question back?

(WHEREUPON, the record was read by the reporter as requested.)

MS. ALBRECHT: Let me clarify something here. To whom do you refer when you refer to Salomon? Are you referring to one party, more than one party? Are you making a distinction between Salomon Brothers, Inc., Salomon Brothers Realty?

MR. HEIN: No, I'm not.

MR. HAMILTON: Object to the form; leading.

BY THE WITNESS:

A: We did think that aided us, yes.

BY MR. HEIN:

Q: And in what way did it aid you?

A: It gave the seller of the properties the comfort that we could close the transaction which helped in our negotiations with the seller.

Q: And among other things it helped Motels of America achieve a better price than it otherwise might have?

MR. HAMILTON: Objection; leading.

BY THE WITNESS:

A: It may have. I'm not sure.

BY MR. HEIN:

Q: In the case of Portfolio II did Motels of America likewise need a firm commitment of the funds as opposed to simply a best efforts attempt to try to sell notes for that transaction?

A: Yes.

Q: And in that transaction did it assist Motels of America in negotiating the terms of the acquisition, including the price of the acquisition, that Motels of America was to have a firm commitment from Salomon to supply the funds as opposed to simply a best efforts undertaking to try to sell notes?

MR. HAMILTON: Objection; leading and lack of foundation; no indication as to how this witness could really answer that question.

BY THE WITNESS:

A: I believe it did help us.

BY MR. HEIN:

Q: And in the Portfolio III or Cricket acquisition, did Motels of America in that transaction need a firm commitment by Salomon to supply funds as opposed to simply a best efforts undertaking to try to sell notes?

A: Yes.

Q: And did the fact that Motels of America was to get a firm commitment from Salomon to supply the funds as opposed to simply a best efforts undertaking to try to sell notes, did that assist Motels of America in negotiating terms of the acquisition including price?



MR. HAMILTON: Objection on the grounds of lack of foundation, leading and compound.

BY THE WITNESS:

A: I believe it helped us, yes.

**[441:6-442:4]**

Q: And do you recall that when Mr. Livingston came aboard in November and December of 1989 part time there was some feeling of optimism that he would in fact assist efforts to better control administrative and general expenses?

MR. JACKSON: Objection; leading.

MR. HAMILTON: Objection; leading and vague.

BY THE WITNESS:

A: I believe the way to describe it was we had a sense of optimism that we were going to change the management structure of the company that would benefit MOA, and Mark Livingston would be a good person to help orchestrate that.

Q: That was the thought process in the fall of 1989 on that subject, is that correct?

A: Yes.

Q: Was it the belief at that time within MOA that with this change in management structure with bringing Livingston on board that progress could be made in better controlling those expenses?

MR. HAMILTON: Objection; leading.

BY THE WITNESS:

A: Yes.

**[457:11-458:21]**

Q: Let me direct your attention to minutes that were previously marked and direct you specifically to the minutes in Exhibit 17, August 11, 1989.

Let me direct your attention to page 2 of the minutes and you will see there is a sentence part way through the second paragraph there which says, "Mr. Riedel stated the timing of closing was timed beautifully because the day following closing the rate went up 50 basis points." Do you see that?

A: Yes.

Q: And what was the point you were making in that statement to the Board?

A: If we would have waited one more day, we would have paid 50 more basis points on the note.

Q: And had interest rates indeed gone up by 50 basis points the next day?

A: Yes.

Q: Was that a fairly dramatic move?

A: It was significant, yes.

Q: And was that a reflection of the volatility at the time in the financial markets?

MR. HAMILTON: Objection; foundation.

BY THE WITNESS:

A: It may have been, yes.

Q: And did it cost MOA a penny more by virtue of the fact that the day after the closing rates had gone up 50 basis points?

MR. JACKSON: Object; argumentative.

BY THE WITNESS:

A: Well, our rate was locked at the time of closing.

Q: Locked in by Salomon, correct?

A: Yes.



**[463:17-20]**

Q: Do you recall making the statement to the Board on November 10, 1989 that the results of operations to date are mostly as expected?

A: Yes.

**[468:8-469:8]**

Q: And if you will direct yourself to the page MOA7936, the first page of Exhibit 73, which is a January 25, 1990 letter, Mr. Winston makes the statement, "Through 1990 we will be promoting Cricket Inns at a level that they have never been marketed before. $750,000 will be spent in direct sales, advertising and marketing Cricket Inns."

Was that MOA's plan and intention as of January, 1990?

A: I don't recall if those were the specific numbers. I would assume those are correct.

Q: And if you will look at the next paragraph, it says "Our plans for the future are for growth." Was that MOA's plans as it related to Cricket in January, 1990?

MR. HAMILTON: As relates to Cricket, was that the question?

MR. HEIN: Yes.

BY THE WITNESS:

A: That was a possibility, yes.

Q: And that was what MOA was hoping for as of January, 1990, growth of Cricket Inns, is that correct?

A: Yes.

**[469:17-469:20]**

Q: Can you identify Exhibit 74 for me?

A: This appears to be a general information package on Motels of America that was produced by Motels of America.

**[470:9-12]**

Q: Was this prepared, this particular document, Exhibit 74, prepared in or about May of 1990?
A: The date on it is May, 1990.

**[471:3-21]**

Q: Let me direct your attention to page 7873. Do you see the statement there in bold print, quote, "MOA will continue to improve and expand its operations on a controlled basis"?
A: Yes, I see that.
Q: Was that MOA's plan as of May, 1990?
A: Yes, although I think improve and expand its operations on a controlled basis may need some definition and explanation.
Q: Did MOA as of May, 1990 project that its occupancy would increase from 64 percent in 1989 to 66 percent by 1992?
A: That's what it says here, yes.
Q: And did MOA project as of May, 1990 that its average daily rates would increase from $33 in 1989 to approximately $38 during the next five years?
A: Yes, that's what it says here in this document.



**[472: 5-18]**

Q: First let me just direct you back, I'm sorry, to Exhibit 74 and page SB7872. Do you see the third kind of bold heading which reads, quote, "MOA will continue to build equity and provide financial stability"?
A: Yes.
Q: Was that MOA's plan or intention as of May, 1990?
A: Yes.
Q: Under that it says that MOA will do this, quote, "through the profitable operation of its existing portfolio," close quote. Was that MOA's plan as of May of 1990?
A: Yes.

**[559:11-560:11]**

Q: So your best refreshed recollection is that you did have a conversation with Thompson where he made a request that certain information be supplied to NISA, is that correct?
A: Yes, I believe so.
Q: And in response to that request, did MOA supply to NISA whatever information Mr. Thompson requested that it do so?
A: I'm not sure. I believe we would have responded to any reasonable request.
Q: Mr. Riedel, did Motels of America from time to time supply information to Ameritech concerning the performance of the different motel portfolios in which Ameritech had a participation interest?
A: I believe so, yes.
MR. JACKSON: Object, lack of foundation.
BY MR. HEIN:
Q: Did Motels of America from time to time supply copies of the monthly financial statements that were produced with respect to the particular portfolios to Ameritech?

MR. JACKSON: Object, lack of foundation.
BY THE WITNESS:
A: I believe so, yes.

**[724:9-13]**

Q: You recall there was a breakfast meeting at the Town & Country at some point in December, 1989?
Do you recall that:
A: Yes.

**[779:3-10]**

Q. Specifically, you recall no discussion about the Portfolio III or Cricket Inn fee agreement, is that correct?
A. I don't recall if there was any discussion about it.
Q. Do you recall any discussion of Ameritech at the Town and Country meeting?
A. No, I don't.

**[897:17-898:17]**

Q. Did you play a role in preparing Exhibit 143?
A. Yes.
Q. Do you see on Page A679, second paragraph, the statement, quote, "It is important to note that our analysis of the individual markets has revealed that the region is under-performing national averages because of general economic conditions and that Cricket Inn occupancies reflect this," close quote.
Was that your view in August of 1990?
MR. JACKSON: Object, leading.
BY THE WITNESS:



A. Yes, its was.
BY MR. HEIN:
Q. And if you'll look at the first bullet that follows, the — it states, quote, "The regional economy is suffering from unexpected slowdowns in the backbone manufacturing industries of the area, such as construction and textiles, tobacco and furniture processing. The area is also being impacted by cutbacks in military spending," close quote.
Was that your view in August of 1990?
A. Yes, it was.

**[949:14-24]**

Q. Do you recall any discussion with Mr. Roquemore or Mr. Port wherein either or both of them expressed a desire to have a firm commitment from MOA with respect to MOA's ability to finance the acquisition of the Cricket Inns?
A. Yes.
Q. What do you recall in that regard?
A. Simply that they were desirous of knowing that the transaction would be completed, and they were looking for some surety that financing could be arranged for the transaction.

**[950:18-951:20]**

Q. Do you recall that the subject of assurances with respect to a firm commitment or surety on the financing came up in the context of renegotiation of the price or terms of the acquisition?
A. I remember it did, yes.
Q. Can you tell me about that?

A. I can't tell you the details. I remember that, as we attempted to renegotiate the transaction, they wanted to know that the transaction was going to be completed if they agreed to changes.

Q. Am I correct that Turnpike's position was that they would agree to the changes in the terms that MOA was requesting on the condition that MOA provide evidence of surety or assurances as to the fact that financing would be in place?

MR. HAMILTON: Objection. Leading.

MR. JACKSON: Object to the form.

BY THE WITNESS:

A. Well, that was part of the negotiations. I'm not sure what they would have agreed to.

BY MR. HEIN:

Q. But that was their position at the negotiations.

A. That was their posturing, yes.

**[953:13-22]**

Q. But in response to the Turnpike requests for assurances of certainty as to the money being there, MOA pointed to the fact that Salomon had acted as principal and could act as principal again for Cricket Inns, is that correct?

A. That's pretty much correct, yes.

Q. And thereafter MOA succeeded in getting Turnpike's agreement on terms more favorable to MOA, correct?

A. I believe so, yes.

**[981:18-984:7]**

Q. What was your understanding as to why the demand was dropping?



A. The economy in general was weakening; and, again, in the markets that we were in, Cricket Inns, it was particularly soft in those markets.

Q. The economy was?

A. The economy.

Q. This is as of the summer of 1990?

A. Yes.

Q. And were there any other events with respect to world affairs or world circumstances that impacted adversely on the markets for the Cricket Inns as of the summer of 1990 and the fall of 1990?

MR. JACKSON: Object, lack of foundation.

MR. HAMILTON: Objection, lack of foundation.

BY THE WITNESS:

A. Well, there were numerous events that you deal with every year that are just part of doing business that affected us, but the big effect was just too much supply and too little demand.

BY MR. HEIN:

Q. Do you recall whether the Iraqi invasion of Kuwait had any impact?

A. It did, yes.

Q. What was the nature of that impact?

MR. JACKSON: Objection, foundation.

BY THE WITNESS:

A. It varied from property to property. Some operators were negatively influenced as demand dropped. Other properties, some that were near military bases, actually got a positive effect from it.

Our overall feeling was that net we had a negative impact from the Gulf War.

BY MR. HEIN:

Q. There had been increases in supply in the various years prior to 1990, had there not?

A. Yes.

Q. And in those years there had been corresponding increases in demand, is that correct in general?

MR. JACKSON: Object, foundation.

BY THE WITNESS:

A. That's a pretty broad statement. Historically, supply had been less than demand, although there were always peaks and valleys.

Sitting here now and looking back, in hindsight 1990 was probably the worst year that the hotel industry ever had; and that can be well documented.

BY MR. HEIN:

Q. Was that because, unlike prior years, demand, rather than rising to fill the supply, instead dropped?

A. That's part of the equation, yes.

MR. JACKSON: Objection.

BY MR. HEIN:

Q. So when you refer to an oversupply, that's an oversupply in the context of dropping demand, is that correct?

A. Again, yes, that's part of the equation.

**[1196:6-1197:9]**

Q: Did you discuss with Mr. Henry how much of the participation had been sold to Ameritech?

MR. HEIN: On what occasion? You are talking about Portfolio I now.

MR. JACKSON: That's what I thought he was referring to.

BY MR. JACKSON:

Q: Go ahead.

A: I believe it was stated in the information they sent to us how much they had sold.

Q. Do you recall whether it was 100 percent or something less?

A. I think they - Salomon retained a very small portion of it. I don't remember the percentages exactly.



Q: Did Mr. Henry tell you why that was the case?

A: I believe at the time he said it was because they wanted to continue to track the progress of the portfolio.

Q: Who wanted to continue to track the progress of the portfolio?

A: Salomon did.

Q: Did you discuss with Mr. Henry what he was going to do to track progress of the portfolio?

A: Only that we would continue to send to him the operating results and financial statements from the properties.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Lloyd B. Thompson, Ameritech Director of Real Estate Investments, January 14 & 15, 1993, September 30, 1993**

(R. 243: Deposition Binder Vol. 5, Tab 55) (Excerpts)

**[6:16-24]**

Q. Mr. Thompson, were you employed by Ameritech Corporation at some point in time?
A. Yes, I was.
Q. And during what period of time was that?
A. From mid-1987 to September of 1990.
Q. What was your position with Ameritech Corporation during that period of time?
A. I was director of real estate investments.

**[7:22-8:5]**

Q. As of 1987 when you joined Ameritech Corporation, in mid-1987, how many years experience did you have with real estate and real estate investments?
A. Over ten years.
Q. As of 1987 when you joined Ameritech Corporation were you also an attorney?
A. Yes, I was.

**[8:9-14]**

Q. To whom did you report at Ameritech in the period mid-1987 through September, 1990?
A. Donald Phillips.
Q. And what was his title?



A. Chief investment officer I believe.

**[13:9-20]**

Q. Subsequent to, after, December of 1989, did the real estate industry generally experience some significant declines in real estate values?
MR. FELDMAN: Objection to the form of the question.
BY THE WITNESS:
A. Yes, there has been — I'm not sure that I could put the time frame to December of '89, but I think certainly there has been a decline in real estate values during the years following.
Q. The years following December, 1989?
A. Yes.

**[14:21-15:5]**

Q. Would it be correct as a general matter that all of the sectors in the hotel/motel industry suffered in the period following December, 1989, to a greater or lesser extent, but did suffer along with the entire real estate industry?
MR. NICKELS: Objection; foundation.
MR. FELDMAN: And form.
BY THE WITNESS:
A. I believe that's the case, yes.

**[18:17-19:8]**

Q. Mr. Thompson, as of 1989 did you personally know in advance that the real estate industry was going to suffer this decline in values that occurred thereafter after 1989?
A. No

Q. As of 1989 did you personally predict in advance that the real estate business would suffer this decline in values that occurred after 1989?
A. No, I did not.
Q. Was the decline in real estate values that occurred after 1989 something that was generally foreseen or generally predicted before it happened?
MR. JACKSON: Object; foundation
BY THE WITNESS:
A. Not to my knowledge.

**[77:2-78:3]**

Q. Who made the decision to purchase on behalf of any fund or account managed for APT the four participation interests?
A. I believe NISA.
Q. Was there anyone else other than NISA, to your knowledge, who made the decision to purchase the four participation interests on behalf of APT or a fund managed for APT?
A. I'm not aware of a decision other than the NISA decision.
Q. Was the NISA decision, to your knowledge, to purchase the four participation interests approved by any person or committee outside of NISA?
A. I'm not aware of any committee outside of NISA.
Q. What about persons outside of NISA?
A. I'm not privy to any conversations that Don Phillips would have had. I don't know anybody else who would have been involved.
Q. Okay. To the best of your personal knowledge, then, the NISA decision to make the purchases of the four participation investments was not approved by any person or committee outside of NISA, is that correct?
A. I don't know of specific approval.



**[205:23-206:6]**

Q. Did you assume that NISA was monitoring the participation interest investments because NISA was the investment manager that made the investments?
A. The investment management function which they were managing, as I understood it, all of the investments within their portfolio would have included these transactions.

**[206:7-207:21]**

Q. And is the fact that NISA was the investment manager and held the participation interest in its portfolio the basis for your assumption that they would be monitoring them?
MR. NICKELS: In addition to the conversation he has already described to you with Mr. White.
BY THE WITNESS:
A. I was going to relate that the impression that I had from statements made during conversations with Mr. White is that Mr. White -- that Salomon, rather was going to provide information and monitor, which they indicated they were already doing, the Motel of America investments and that at least in one conversation that I can remember in which Mr. Gorman was involved that was a specific discussion item.
Q. When did this conversation occur?
A. It was a part of the conversation where Mr. White described this investment to Mr. Gorman and there may have been others as well from NISA in this conversation. I don't recall. But I was a part of the conversation as well.
Q. Sometime in the fall of 1987?
A. It would have been in the fall of '87, yes.
Q. Do you recall the specific statement by Mr. White to which you are alluding?

A. I don't recall the specifics of the statement. I recall the specific tenor and coverage of the statement in my mind, which was that Salomon, and as a backdrop to the -- this particular point, Salomon, as among other discussion items in that meeting and previously on other conversations with me, had indicated their existing involvement in the transaction, that they were already set up, had people monitoring the transaction and that Mr. Gorman specifically indicated his concern that the monitoring continue. I do not recall the specific language.

**[209:24-210:4]**

Q. To your knowledge, was there ever a written agreement with Salomon whereby Salomon agreed to monitor the participation interests on behalf of Ameritech?
A. I don't know of any such agreement.

**[283:7-284:11]**

Q. At some point, you told Mr. White that a particular price was something that Ameritech would deem to be an acceptable price, is that correct?
A. Yes, I believe so.
Q. And was the price that you told White would be an acceptable price to Ameritech a price lower than the price initially proposed by Salomon?
MR. NICKELS: Object to the form.
BY THE WITNESS:
A. Yes.
BY MR. HEIN:
Q. Who made the decision to tell Salomon that a particular price was acceptable to Ameritech? Was it you? Was it Mr. Phillips? Was it NISA? Was it someone else?



A. From the standpoint of my responsibilities, Mr. Phillips would have determined that that was an acceptable price.
Q. Was that based on your recommendations?
A. It was based on my review.
Q. Did you make a recommendation to Mr. Phillips as to what you viewed to be an acceptable price?
A. I believe that I made a — a review of the transaction and suggested that I thought it was an attractive price. I don't remember whether there was ever the use of the word recommendation or it was in that context.

**[285:1-286:16]**

BY MR. HEIN:

Q. Let me just -- is there anything further that you can recall about any of the conversations you had with Mr. White prior to the conference call or meeting where White and NISA both participated --
MR. JACKSON: Thank you.
BY MR. HEIN:
Q. -- that you've not already recounted?
A. Yes. There was a discussion on Salomon retaining an interest in the transaction.
Q. What was said on that subject?
A. The specific language I can't draw on, but I can tell you that the discussion centered on the knowledge that Salomon was already in the investment. It was their investment. They had people up monitoring and tracking the investment. I had indicated yesterday that they said that they could do that and would.
And we believed that their having some involvement -- a retention of an involvement in the transaction was appropriate for that consideration. Greg indicated that he did not think that that would be a problem.

Q. Mr. White did not think it would be a problem for Salomon to retain an interest in the participation interest, correct?

A. Well, that he did not think that there would be a problem for them to retain an interest in the participation, but I don't want to limit that response to indicate that he was indicating that there was a problem in some other area.

They clearly agreed that they were in a position to and would monitor the transaction, and this discussion on the retention of the interest was a part of that discussion.

Q. You understood that from Mr. White that Salomon, because it had this participation interest, was monitoring the transaction, correct?

A. They told me they were.

**[288:18-23]**

Q. Did you ever make the statement in words or substance to Mr. White that Ameritech requests Salomon to monitor the transaction on behalf of Ameritech?

A. I don't recall making that statement, no.

**[319:3-320:2]**

(WHEREUPON, the record was read by the reporter as requested as follows: Mr. Thompson, is there anything in Exhibits 36, 37, 38, or 39 that talks about Salomon Brothers having a responsibility to provide reports to NISA?)

MR. JACKSON: Same objection.

MR. NICKELS: Same objection.

You can answer.

BY THE WITNESS:

A. Okay, I don't see anything in those documents to that effect.

MR. JACKSON: Move to strike.



BY MR. HEIN:

Q. Are you aware of any written document pursuant to which Salomon accepted or undertook a responsibility to provide reports to NISA concerning the participation interest investments?

MR. NICKELS: Asked and answered.

MR. JACKSON: Same objections

BY THE WITNESS:

A. I'm not aware of such a document.

MR. JACKSON: Move to strike.

**[329:11-18]**

Q. You understood Greg White was looking out for Salomon's interests, correct?

A. Yes.

Q: And you understood that someone on the Ameritech side, either at Ameritech or NISA, was looking out for the Ameritech and NISA interests, correct?

A: Yes.

**[367:16-369:12]**

(WHEREUPON, the record was read by the reporter as requested as follows: And are you aware of any written document which reflects an agreement by Salomon to monitor, track, watch, or provide information to NISA?)

BY THE WITNESS:

A. I'm not aware of any document that specifies the tracking, monitoring, watching, of the investment for NISA.

BY MR. HEIN:

Q. Are you aware of any written document that talks or refers to Salomon as managing any of the participation interest investments —

MR. JACKSON: Object. Vague.

BY MR. HEIN:

Q. — for Ameritech or NISA?

A. I'm not aware of a document that refers to Salomon managing the investment.

Q. Do you recall any discussion where anyone from Salomon agreed to manage the participation interest investments?

A. I don't recall a discussion that referenced the word "management."

Q. Do you recall any discussion where anyone from Ameritech or NISA asked that Salomon manage any of the participation interest investments?

MR. JACKSON: In words?

If you don't clarify, I will object, vague.

BY THE WITNESS:

A. I'm sorry. I'm lost.

MR. HEIN: Reread the question.

(WHEREUPON, the record was read by the reporter as requested as follows: Do you recall any discussion where anyone from Ameritech or NISA asked that Salomon manage any of the participation interest investments?)

BY THE WITNESS:

A. I don't recall that reference to managing in conversation, no.

**[532:12-24]**

Q. Was it your understanding that Mr. Phillips was looking to you to, in effect, be of assistance to NISA in assisting NISA in its evaluation of the proposed interest



investment to the extent that your real estate background might be of use to NISA?

A. It was my understanding that I was supposed to review the information that was provided by Salomon for -- or rather from Salomon and that I would be discussing that information with Salomon in connection with the transaction and that, in effect, would be a resource for NISA to draw on for this.

**[533:1-2]**

Q. You would be a resource to NISA?

A. Yes.

**[676:1-14]**

[Q.] As a general matter, you were familiar with the use of what we'll call 100 percent financing, correct?

A. Uh-hum.

Q. And that was a situation where someone in buying a real estate asset was able to find someone to lend them essentially all the money it took to make the purchase?

A. Uh-hum.

Q. And you were aware that each of these four transactions had involved 100 percent financing, correct, roughly?

A. Roughly.

Q. Roughly 100 percent?

A. Yes.

* * *

**[678:3-11]**

Q. Let me just – you understood that the mortgage notes that provided the 100 percent financing on these different projects were nonrecourse to MOA or, in the one case.

Best Inns, [--] is that correct? Meaning that MOA or Best Inns was not obligated to pay the notes, that the only recourse of the noteholders was to the properties themselves, is that correct?

A. Yes, yes.

* * *

**[788:5-10]**

Q. Was it your understanding that Salomon did not pay money out of pocket but rather got the fee agreement as compensation for arranging debt financing?

A. I knew that was part of their arrangement, yes.

**[869:20-870:23]**

Q. Did Salomon Brothers in 19—the period 1987 through 1989 control any communications between Motels of America on the one hand and APT or NISA on the other hand?

MR. JACKSON: Object. Foundation

BY THE WITNESS:

A. I don't recall that there any such agreement to that effect. I don't remember thinking about that. Salomon – there was information which came to our office certainly from Motels of America.

BY MR. HEIN

Q. Without going through Salomon?

A. That was my recollection.

Q. Do you know what – I take it that you at APT did not establish any procedures for monitoring the performance of the Motels of America portfolios; is that correct?

A. It was my understanding that that was being done at NISA and not at Ameritech. I did not establish any procedures.



Q. Your understanding was that NISA had that responsibility?

A. I didn't – I'm not quite sure what the breadth of the question is, but it was my understanding that the information – the receipt of the information and the tracking was being done by NISA.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Gregory A. White, Managing Director of Salomon, December 16, 1992**

(R. 243: Deposition Binder Vol. 5, Tab 59) (Excerpts)

**[89:19-24]**

Q. What was the nature of your involvement with respect to the transfer of the fee agreement dealing with MOA Portfolio I?
A. I had a series of conversations with Mr. Tom Thompson of Ameritech regarding the potential investment.

**[90:22-91:25]**

Q. What were the subject matters of these telephone conversations?
A. I related to Mr. Thompson the investment or described generally an investment that Salomon Brothers was to be offering, in this case the fee agreement for MOA I, and I related it to a meeting that I had been part of some time earlier with Mr. Thompson and Mr. Don Phillips of Ameritech and Mr. Manolis of Salomon Brothers, Mr. Mark Field of Salomon Brothers. And there may have been others, many others, I really don't recall who else was in attendance.

But in that meeting, Ameritech via Phillips and Thompson had asked that Salomon Brothers make them aware of deals that we would be marketing that were of a very high risk and potentially very high return nature.

We had subsequent conversations that related to the specifics of what the fee agreement was, its risk characteristics in terms of how the cash flows of the fee



agreement were structured. We spoke about potentially adverse tax consequences, specifically unrelated business income tax, UBIT as it's commonly referred to.

Mr. Thompson said that he would take the agreement and have it reviewed by counsel on that point. And we generally spoke about the pricing of the issue.

**[146:21-147:11]**

Q. What I'm trying to find out is whether we're talking that you don't know now because people forget things or whether this is something that you never knew.
A. The only involvement I have had with NISA was a brief conversation that related to the mechanics of document and money transfers. Any other role they had I was not familiar with.
Q. And you previously had testified related to NISA, and is that National Investment Services, Inc.?
A. Correct.

MR. WALTON: Does that comment apply just to MOA I or is that all the deals?

THE WITNESS: All of them.

**[451:6-8]**

Q. While we're talking about meetings, do you recall ever meeting with anyone from NISA?
A. No.

**[451:21-452:6]**

Q. Do you ever recall a meeting at any time where there were present at that meeting one or more people from

NISA and one or more people from Ameritech and one or more people from Salomon that you attended?

A. I am fairly certain I've never met anyone from NISA and I'm fairly certain I've never been in a face-to-face meeting regarding the selling of these investments to Ameritech with anyone from Ameritech.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Deposition Transcript of Carl Winston, Vice President of Operations of Motels of America, August 30 & 31, 1994**

(R. 243: Deposition Binder Vol. 5, Tab 61) (Excerpts)

**[78:23-80:3]**

Q: Did you discuss your personal view regarding financial viability with Mr. Riedel?

A: I discussed it with all the members of the executive commitment as well as the owners of the company.

Q: As best you recall, what did you say to them?

MR. HEIN: Object to the form. It's totally undefined in terms of when, where, circumstances. Also lacking foundation.

THE WITNESS: That the amount of cash flow that could be generated from the properties did not appear to me to be sufficient to support the debt service.

BY MR. JACKSON:

Q: Did you say anything further?

MR. HEIN: Object to the form.

THE WITNESS: Well, the thing I recall that relates to this matter is that I do have this recollection of making a comment to the same group of people that I thought when I had learned, and I believe it was subsequent to the acquisition, that Ameritech had bought the appreciation rights -- and that was my understanding at the time, was that they had purchased the right to a gain -- any and all gain in the value of the portfolio -- I made the comment that I felt they bought air. That phrase stayed with me since that time.

**[80:5-25]**

Q: I represent the record in this case is that Ameritech bought an interest – 95 percent of Salomon's participation interest in the Cricket properties in December 1989.

Using that as a point of reference, can you fix in the time when you learned that Ameritech bought appreciation rights?

MR. HEIN: I object to the form. I think that that's misleading, because the documentary evidence indicates that the notification to MOA may not have been received until sometime in January of 1990.

MR. JACKSON: That may be. That may be.

BY MR. JACKSON:

Q: The documents were executed between Ameritech and Salomon on December 22, 1989.

A: I don't – I can't recall when I was informed of the nature of the Ameritech purchase – the existence or the nature of the Ameritech purchase.

**[415:1-416:10]**

CARL WINSTON

Q: What did you mean by the expression "Ameritech bought air"?

MR. HEIN: Object to the form.

THE WITNESS: My general recollection is that it's -- by buying the air rights over the Empire State Building -- not that specifically, but by example, the air rights over the Empire State Building are probably worthless, and my view was that the right to appreciation -- in fact, if that's what they bought -- was worth nothing because there wouldn't be appreciation, in my view.

BY MR. JACKSON:



Q: What was the basis for your view that you didn't think there'd be appreciation?

MR. HEIN: Object to the form.

THE WITNESS: It was the -- what I expected would be the cash flows resulting from operations and how those cash flows related to the debt service that I was aware of.

BY MR. JACKSON:

Q: Can you be a little more specific?

A: It was my view at the time that there wasn't going to be enough cash flow from operations to make the mortgage payment.

MR. HEIN: Object to the form.

THE WITNESS: Therefore, there was no -- there was nothing left, and the property -- and it was inevitable that there would be no appreciation. The price above that and the price -- there would be no additional -- there would be no appreciation above the price paid by Motels of America for Portfolio III.

**[511:25-512:7]**

Q: Was the press release in Christensen Exhibit-480 prepared and distributed by Motels of America in or about August of 1989 in the regular course of business?

A: I don't recall exactly when it was distributed, but it would have been distributed as part of the normal course of business.

**[512:19-513:7]**

Q: Let me direct your attention to the first paragraph on page 2 of this press release. It's the page with Bates number MOA-8684 which starts with the quote from you. Do you see that it's the paragraph beginning, quote, "Cricket is like a pretty girl with many suitors,' says Winston"?

A: Yes.
Q: Did you authorize the use of that quote in this press release?
A: Did I authorize it?
Q: Right.
A: Yes.

**[519:22-520:6]**

Q: Putting aside the question of the amount of debt that Motels of America might incur to finance the acquisition, viewing the properties as properties putting issues of debt levels aside, did you believe that as a package, the Cricket Inns represented attractive motel properties to acquire?

MR. JACKSON: Object to the form.

THE WITNESS: Yes.

**[524:19-525:3]**

Q: When you say that you have a general recollection that the cash flows over time would be insufficient, that was your personal opinion? Am I correct?
A: That was my personal belief.
Q: And did Mr. Riedel have a different view on that subject prior to the acquisition?
A: Mr. Riedel was significantly more optimistic.

**[543:12-544:11]**

Q: Let me direct your attention to Item 4 in Mr. Hatfield's November 27, 1989 memo. He states, "With respect to the prototype of Cricket Inns, the lobby is equivalent to,



if not a little bit better than, the Hamptons and the property would compete with the Hamptons and Fairfields," close quote.

Do you recall Mr. Hatfield expressing that point of view in late 1989?

MR. JACKSON: Object to the form.

THE WITNESS: Mr. Hatfield was of the opinion, in general, that Motels of America should be growing. I can't pin it to a specific month, but my recollection is that he wanted to grow the Cricket chain.

BY MR. HEIN:

Q: Do you recall any points of view expressed by Mr. Hatfield with respect to the quality of the prototype of Cricket Inns?

MR. JACKSON: Object to the form.

THE WITNESS: If my recollection is correct, which I believe it is, the prototype described here would have been the RTP property, and Mr. Hatfield was quite enamored with it.

**[547:8-548:5]**

Q: Did you send these letters that are the first and third pages of Riedel Exhibit-73 to the parties indicated as addressees in the regular course of your business as vice president of operations at Motels of America in 1990?
A: I believe I did.
Q: Now, Mr. Jackson has referred you to the third paragraph and the first line of the fourth paragraph in these letters. For the record, they read, quote, Throughout 1990, we will be promoting Cricket Inns at a level they have never been marketed before. About 750,000 will be spent in direct sales, advertising, and marketing Cricket Inns. Our plans for the future are for growth, close quote.

My question is was it your understanding that the passages from these two letters that I just read reflected the plans and intentions of Motels of America as a company as of January 25th, 1990?

A: That is my — was the understanding that I had of the company's plans.

**[549:4-550:3]**

[Q:] In terms of what Mr. Riedel was articulating as of the January 1990 time frame, was the Motels of America company position as reflected in paragraphs 3 and 4 of these letters which I just read into the record, something that Mr. Riedel was articulating as of the January 1990 time frame?

MR. JACKSON: Object to the form.

THE WITNESS: Yes.

BY MR. HEIN:

Q: Was the Motels of America company position that is reflected in paragraphs 3 and 4 of these letters that I read into the record what Mr. Livingston was articulating as of January 1990?

MR. JACKSON: Object to the form.

THE WITNESS: I believe it was.

BY MR. HEIN:

Q: Was the Motels of America corporate position stated in paragraphs 3 and 4, which I read into the record, what Mr. Hatfield was articulating as of January 1990?

MR. JACKSON: Object to the form.

THE WITNESS: I believe it was.



**[561:5-23]**

Q: And if you see the article "Getting acquainted by Mark Livingston, president," is that something that Mr. Livingston prepared in or about March of 1990?

A: I believe he did.

Q: Do you recall the general — withdraw that.

You see Mr. Livingston talks about how his three months since he's joined the MOA team have been exciting and challenging.

Do you see that?

A: Yes, I do.

Q: And do you recall that that was a point of view that Mr. Livingston was expressing as of the spring of 1990?

MR. JACKSON: Object to the form.

THE WITNESS: I don't recall specifically in the spring, but I always found Mr. Livingston to be upbeat and positive.

**[568:11-570:14]**

Q: I want to direct you to page 466 of your transcript, Mr. Winston.

So that you have it in context, at page 466 of your deposition, Mr. Jackson had asked you a question about whether any of the information in Riedel Exhibit-134, which is a letter dated August 31, 1990, was inaccurate. And on page 466, you testified that you took exception to the third paragraph on the first page of Exhibit-134.

Do you recall that questioning?

A: Yes, I do.

Q: And you then went on to state that your recollection of the attitude of some people at Motels of America at the time is that it really wasn't underperforming, and that everything was going to be fine.

Do you see that?

A: Yes.
Q: And when you were referring to the attitude of some people at Motels of America at the time, were you referring to the period referenced in that letter, namely the end of 1989?
A: I was — in that statement I was referring to late 1989.
Q: And when you were referring to some people at Motels of America's attitude at that time, late 1989, that it really wasn't underperforming and that everything was going to be fine, to whom were you referring?
A: Primarily to Chap Riedel and Mark Livingston.
Q: What perspective or point of view was Mr. Riedel articulating on the subject of the Cricket Inns as of late 1989, as you recall it?

MR. JACKSON: Object to the form.

THE WITNESS: As I testified earlier, I don't have a specific recollection of late 1989 what his attitude was, but in general, Mr. Riedel was optimistic about the Cricket Inns.

BY MR. HEIN:

Q: What do you recall, in terms of statements or points of view, being expressed by Mr. Livingston as of late 1989 as it relates to Cricket Inns?

MR. JACKSON: Object to the form.

THE WITNESS: Again, I have no specific recollection of late 1989 points of view, but in general, Mr. Livingston was optimistic.

**[575:23-577:10]**

Q: Was it the Motels of America corporate position in 1989 that cash flow that could be generated from the Cricket Inn properties would not be sufficient to support debt service?

MR. JACKSON: Object to the form.



THE WITNESS: While there were individuals within Motels of America's management and ownership who were not certain there was sufficient cash flow, the company clearly believed there was by its action of executing the purchase.

BY MR. HEIN:

Q: Were there other executives at Motels of America whose opinion on the subject of the sufficiency of the cash flow to cover debt service differed from yours?
A: Yes.
Q: Who were they?
A: As I recall, it was Chap Riedel, and secondarily Guy Hatfield.
Q: Who at Motels of America had the principal responsibility for financing and acquisition activities as of 1989?
A: Chap Riedel was the lead person for that activity.
Q: And what was his position as of the summer and fall of 1989?
A: Owner.
Q: Did he have any other position with the company?
A: I can't recall.
Q: What was Mr. Hatfield's position with the company in the fall and summer of 1989?
A: I believe he was the Chairman of the Board.

**[577:17-578:24]**

Q: Am I correct that your opinion on the subject of the sufficiency or insufficiency of cash flow from the properties to support debt service was based more on your opinion of overall macroeconomics of supply and demand as opposed to specific condition or qualities of particular Cricket Inn properties?
A: Generally, yes.

Q: What do you mean by "overall macroeconomics of supply and demand"?
A: What I meant was that my knowledge of lodging development and lodging operating levels at the time was that demand tended to grow in increments of 1 to 5 percent annually but was relatively steadily growing, reflecting general economic conditions within a region or in the U.S. overall. Supply, however, had a tendency to grow in much more irregular increments, and that in a given market, supply could grow significantly more than 5 percent. This would then create a competitive problem for all the properties involved. It was my experience at the time that that trend was occurring in the U.S. overall, and in the southeastern United States particularly.
Q: By "supply," what are you referring to?
A: New motels and hotels.
Q: By "demand," what are you referring to?
A: The people who stay in motels and hotels.

**[581:3-7]**

Q: Are attempts to forecast supply and demand at any particular point in time inherently uncertain?
MR. JACKSON: Object to the form.
THE WITNESS: Yes.

**[581:19-582:2]**

Q: But as a general matter, in your experience, is this area of predicting the future as it relates to supply or demand or both something where at any given point in time you may find different people with different good faith beliefs?
MR. JACKSON: Object to the form.
THE WITNESS: Yes.



**[585:14-586:10]**

Q: And do you recall what Mr. Riedel's opinion articulated in these discussions was at the time?
A: I believe his opinion was that we were at the bottom of the curve.
Q: And what does that mean?
A: That things could only get better.
Q: And when you say "bottom of the curve," am I correct in understanding you that Mr. Riedel was articulating the point of view at the time in 1989 that occupancy had been trending down, but had reached bottom and could only get better going into the future? Is that correct?
MR. JACKSON: Object to the form.
THE WITNESS: That's what I believe I said.
BY MR. HEIN:
Q: Were there others who articulated the same point of view that Mr. Riedel did?
A: I believe Mr. Hatfield may have, but I don't recall anybody else having that belief.

**[591:8-593:11]**

Q: Were your views or opinions on the subject of the sufficiency of cash flow going forward to cover debt service going forward colored or affected by your position as the person who was vice president of operations?
A: To some extent, yes.
Q: As an operations person, would it be correct that you would have an inherent bias towards being skeptical of particular projected levels of performance?
A: Yes.
MR. JACKSON: Object to the form.
BY MR. HEIN:
Q: Why is that?

A: Because the operator's the one who has to produce the results and is measured against projected results.

Q: Am I correct that in terms of the internal political dynamics at Motels of America that from a personal point of view, if you signed on to Chap Riedel's projections you would be at greater risk of being criticized if Motels of America fell short than if you had not signed on to those projections?

MR. JACKSON: Object to the form.

THE WITNESS: I suppose so.

BY MR. HEIN:

Q: In your observation of Mr. Riedel, when he was articulating the optimistic point of view that you've described, was he doing so in good faith, as far as you know?

MR. JACKSON: Object to the form.

THE WITNESS: Yes.

BY MR. HEIN:

Q: You referred to Mr. Riedel, when I asked what his position was in the fall of 1989, as being one of the owners of Motels of America, and you didn't recall his precise corporate title.

Do you recall that testimony a few moments ago?

A: Yes.

Q: And what did you mean by "owner"?

A: That he was a principal who owned a percentage of a company called Motels of America.

Q: Was it your understanding as of the summer and fall of 1989 that Mr. Riedel stood to make money from his ownership position if Motels of America was successful, but potentially lose money if it were not?

A: Yeah. That would be my understanding.



**[597:22-598:2]**

* * *

Q. Was this opinion on your part, that Ameritech had bought air, a personal opinion?

MR. JACKSON: Object to the form.

THE WITNESS: It was my opinion, yes.

**[598:10-16]**

* * *

Q. At the time that you expressed this opinion about Ameritech's purchase of the appreciation interest in Portfolio III in hallway conversation, did you know anything about the nature of the investment philosophy of Ameritech pension fund?

A. No.

**[599:19-601:19]**

Q. At the time you expressed this opinion about Ameritech's purchase of the appreciation rights, had you personally read the fee agreement for Portfolio III that Ameritech had bought an interest in?

A. I don't believe I had.

Q. At the time you expressed that opinion, had you personally read a typed outline — or a printed outline of the terms of that fee agreement?

A. I don't believe I had.

Q. At the time you expressed that opinion, do you recall having had discussions with anyone at Motels of America on the subject of how the Motels of America fee agreement that Ameritech bought an interest in worked?

A. No, I don't believe so.
Q. Had you played any role at all in negotiating the terms of any of the three fee agreements for the Portfolios I, II or III?
A. Not that I recall, nor do I believe I did.
Q. Did you play any role in calculating the moneys due or potentially due pursuant to the terms of any of the three fee agreements for Portfolios I, II or III?
A. I have a recollection of seeing documents while employed by Motels of America regarding fee participation, but just a vague recollection.
Q. Apart from simply seeing something that someone else prepared, did you personally play any role in preparing calculations or approving calculations pursuant to the terms of any of these three fee agreements?

MR. JACKSON: Object to the Form.
THE WITNESS: No.
BY MR. HEIN:

Q. Did you have any specific responsibility at Motels of America relative to any of the three fee agreements?
A. I don't believe so.
Q. At the time you expressed the opinion that you've described about Ameritech's purchase of an interest in the third fee agreement, did you know one way or the other what the terms of the formula for distributions under that fee agreement were?
A. I don't believe so.

**[605:10-607:13]**

Q: Let me just back up for a moment to back to 1989. Do you recall — apart from reviewing work that others did, do you recall that you personally did any computer analysis of historical cash flows for the Cricket Inns?
A: As I didn't use a computer at the office, no.



Q: Am I correct then that because you didn't use a computer, you did not personally do any computer analysis of any sort relative to Cricket Inns, either historical or forward-looking analyses?
A: Yes, that's correct.
Q: Do you recall at any point in time in 1989 preparing any written report or written analysis of Cricket Inns' historical cash flow or projected results?
A: I don't believe I would have prepared any written report of that nature.
Q: Do you recall at any point in time communicating in writing to someone else at Motels of America your opinion on the subject of the ability of the Cricket Inns' cash flow to cover debt service?
A: No. I wouldn't have done that.
Q: Do you recall at any point in time making any written record for the files, or for your own retention, of your opinions on the subject of the ability of the Cricket Inns to cover debt service?
A: No.
Q: Do you recall any occasion prior to December 31, 1989 on which you personally told someone from Salomon that it was your personal opinion that the Cricket Inn cash flow would not be sufficient to cover debt service or that Motels of America had overpaid for the Cricket Inns?
A: I may have, but don't recall.
Q: Sitting here today, am I correct that you have no recollection of doing that?
A: That's correct.
Q: Do you recall any occasion in 1990 on which you told anyone from Salomon what your personal opinion was on the subject of the ability of the Cricket Inns' cash flow to cover debt service, or on the subject of whether Motels of America had overpaid on that acquisition?
A: I may have, but I can't recall.

Q: Am I correct that sitting here today, you have no recollection of doing that?
A: That's correct.

**[757:3-15]**

Q: In your experience with Mr. Riedel and Mr. Livingston at Motels of America in 1989, did they display that optimistic character that you've ascribed to both of them?
MR. JACKSON: Object to the form. He did not testify to that effect regarding Mr. Livingston, and otherwise object to the form.
THE WITNESS: Yes. Very optimistic.
BY MR. HEIN:
Q: Both of them?
A: Yeah.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Feld Deposition Exhibit 50 (K. Feld of Ameritech Memo to H. Malone of Ameritech, dated May 24, 1990)**

(R. 243) (Excerpts)

May 24, 1990

Harry,

Re: Motels of America
Private Placements Held in the Dedicated Bond Fund

At your request, I attended a meeting at the NISA offices on May 21 to discuss our holdings in Motels of America. I met with Joe Gorman, Jeff Bryden, and Chuck Henry (of Salomon Brothers). My review of these private placements plus comments and recommendations are presented below.

* * *

Comments/Recommendations

My comments and recommendations focus on two aspects of these private placements: (1) managing/monitoring our investment and (2) the appropriateness of the placement as an investment in the Dedicated Bond Fund.

Managing/Monitoring: Our investment is not being managed or monitored. The investment is carried at cost and cash flows are recorded. This is not a criticism of NISA. They are not real estate analysts. The placements were not investment decisions for their managed accounts but were accommodations to Ameritech. Because Salomon kept a

piece of the first deal, there is some assurance that due diligence is maintained. However, Salomon does not have an interest in the subsequent deals.

I recommend Tom Thompson review these deals and put into place methods and procedures for management and monitoring of the investments.

* * *

[Signature]
KFF/jb



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Gorman Deposition Exhibit 308 (Investment Manager Agreement Between Ameritech and NISA, dated April 1, 1988)**

(R. 243: Gorman Exh. 308) (Excerpts)

INVESTMENT MANAGER AGREEMENT

AGREEMENT, dated as of the 1st day of April, 1988 between American Information Technologies Corporation (Ameritech), a corporation organized under the laws of the State of Delaware (hereinafter referred to as the "Company"), and National Investment Services of America, Inc., a corporation organized under the laws of the State of Delaware, (hereinafter referred to as the "Manager").

The Company is authorized to appoint one or more investment managers to direct the investment of portions of the assets of the Ameritech Master Pension Trust (the "Trust Fund") created by the agreement (the "Trust Agreement") dated as of January 1, 1984 between the Company and Harris Trust and Savings Bank as trustee (the "Trustee").

NOW THEREFORE, in consideration of the terms and conditions herein contained, the parties agree as follows:

1. Appointment of Investment Manager.

(A) The Company hereby appoints the Manager, and the Manager hereby accepts such appointment, to provide investment counsel and to manage and direct the investment of that portion of the Trust Fund as determined by the Company and specified in written notice given to the Manager and to the Trustee (such portion is hereinafter referred to as "Investment Account"). The Manager agrees to perform its duties hereunder with the care, skill, prudence,

and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims and consistent with the Manager's obligations and duties under the Employee Retirement Income Security Act of 1974 ("ERISA") and consistent with the Manager's obligations and duties under the Trust Agreement; provided, however, that the Manager shall not be bound by or required to take cognizance of any provision of or any amendment to the Trust Agreement unless a copy in writing of such provision or amendment is furnished to the Manager.

(B) With respect to its Investment Account, the Manager represents and warrants to the Company that: (1) It is an "Investment Manager," as that terms is defined in Section 3(38) of ERISA; (2) It is a "fiduciary," as that term is defined in Section 3(21)(A) of ERISA; (3) It is not subject to any of the disqualifications described in Section 411 of ERISA; and (4) It is a registered investment manager under the Investment Advisors Act of 1940.

2. Investment.

(A) Subject to the provisions of Section 1, the Manager is authorized and empowered in its sole discretion:

(1) To direct the Trustee to invest and reinvest the assets in the Manager's Investment Account, without distinction between principal and income, in securities suitable for the investment of retirement trust funds and subject to the authorized investments set forth in Addendum B hereto and such investment guidelines as may from time to time be communicated in writing to the Manager by the Company.

(2) Unless otherwise specified in writing by the Company, to place orders to purchase, sell, or exchange assets in its Investment Account in such markets and through such brokers as in the Manager's best judgment shall offer



the most favorable price and market for the execution of each transaction. The Company understands and agrees that, subject to the provisions of Section 28(E) of the Securities Exchange Act of 1934, the Manager may effect securities transactions which cause the Investment Account to pay an amount of commission in excess of the amount of commission another broker or dealer would have charged; provided, however, that the Manager determines in good faith that such amount of commission is reasonable in relation to the value of brokerage and research services provided by the broker or dealer utilized by the Manager, viewed in terms of either the specific transaction or the Manager's overall responsibilities to the accounts for which the Manager exercises investment discretion. The Manager agrees that the receipt and use of such services will not reduce the Manager's customary and normal research activities.

(B) Notwithstanding the foregoing of this Section 2, the Manager agrees that it will not knowingly engage in any transaction prohibited by ERISA and other applicable law.

(C) The Company acknowledges that it has the responsibility with respect to (1) the reasonable diversification of the general investment mix of the Trust Fund and (2) the funding policies, and the implementations thereof, to carry out the objectives of the plans funded through the Trust Fund.

* * *

4. General Covenants and Agreements.

(A) The Manager covenants and agrees to comply with all laws, regulations and rules applicable to it in its performance of this Agreement, including any bonding requirements.

(B) The Company shall furnish to the Manager from time to time and upon request of the Manager certified copies of the resolutions of its Board of Directors evidencing the

names, titles, and authorities of its officers and employees who are authorized to act on behalf of the Company and/or the Trust Fund with respect to the Investment Account. The Manager shall furnish to the Company and the Trustee from time to time and upon request by the Company or the Trustee the names and authorized signatures of the persons authorized to act on its behalf in the form and manner provided in the Trust Agreement.

(C) The Manager covenants and agrees that it shall defend and hold the Company and the Trustee, including the present and former employees, officers and directors of each of them, harmless from and indemnify the Company and the Trustee against any and all liability, loss, damage or expense (including attorneys fees) which either of them may incur or suffer under ERISA or other applicable laws resulting from, arising out of, relating to or in connection with the breach by the Manager of the terms of the Trust Agreement, this Agreement or any of the representations or warranties of the Manager contained herein.

* * *



IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first above written.

COMPANY: AMERICAN INFORMATION TECHNOLOGIES CORPORATION

By: \s_____
Director – Investment Management

INVESTMENT MANAGER: NATIONAL INVESTMENT SERVICES OF AMERICA, INC.

By: \s_____
Title: Executive Vice President

ACKNOWLEDGED BY TRUSTEE: HARRIS TRUST AND SAVINGS BANK

By: \s_____
Title: Vice President

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Gorman Deposition Exhibit 359 (J. Yawits of NISA Letter to J. Mares of Ameritech, dated August 7, 1990)**

(R. 243) (Sal. C.A. App. 726-28, at 726-27)
(Excerpts)

[NISA Letterhead]

Jess B. Yawits
Executive Vice President

August 7, 1990

Ms. Judith W. Mares
Chief Investment Officer
Ameritech
10 South Wacker Drive, 24th Floor
Chicago, IL 60606

Dear Judy:

As we discussed, I have enclosed information on the private placement activity within the dedicated bond fund. Since Joe Gorman has first hand knowledge from inception of the fund, I asked Joe to put together this information. Feel free to call either of us if you have questions.

* * *

Regards,

[signature]



* * *

Background

* * *

2) Motels of America is a San Diego-based motel owner and operator of Super 8 and other franchised motels. Salomon Bros. approached the Ameritech staff with a real estate proposal for an equity participation they had acquired as part of a financing for this group. The Ameritech staff felt the proposal, $8,565,000 in total, was too small to look at as a separate project, but too lucrative to not own. We were asked to make room for it in our dedicated account private placement category. The first purchase came in two pieces; $6,365,000 on 10/27/87, and $2,200,000 on 5/4/88.

In late 1989 we were asked to make room for another piece that would total $12,350,000. We indicated that our information on the performance of the first transaction was not complete, but what we had seen of the operating numbers and cash flows would suggest a caution about purchasing a second piece. Nonetheless another piece was negotiated and we were asked to make room for it in the dedicated portfolio. A copy of a later memo from Ken Feld is attached with more background.

* * *

Sincerely,

[signature]

* * *

AMERITECH PENSION TRUST
EIN: 36-6783461

* * *

| Item 30 | Yes / No |
|---|---|

* * *

| | |
|---|---|
| (e) Do the notes to the financial statements accompanying the accountant's opinion disclose any nonexempt transactions with parties-in-interest? | [ ] [X] |
| (f) Did the plan engage in any nonexempt transactions with parties-in-interest not reported in e? | [ ] [X] |

* * *



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Mares Exhibit 395 (Letter from Joseph E. Gorman, President, CEO and Director of NISA, to Judith W. Mares, Chief Investment Officer of Ameritech, dated November 7, 1990)**

(R. 243: Mares Exh. 395) (Excerpts)

* * *

[NISA Letterhead]

Joseph E. Gorman, CFA
President

November 7, 1990

Ms. Judith W. Mares
Chief Investment Officer
Ameritech
10 South Wacker Drive
Chicago, Illinois 60606

Dear Judy:

You have asked for more specific dates and background of the meetings leading up to the Motels of America investments. As I mentioned in our prior discussion, my calendar would not tend to distinguish among Ameritech meetings. I have attempted to add my best recollection of discussions to the dates provided by Jeff Bryden's calendar, which specifies those real estate discussions in which he participated. Clearly, it is not an exhaustive summary of the

discussions, but is a summary of what I remember with the information available at this time.

I was both surprised and alarmed by your revelation that all real estate files left by Messrs. Thompson and Phillips had been searched with no indication available that they had analyzed these transactions in any depth. As I reported to you, I have specific recollections that a file of information, including numerical analysis, was used by Mr. Thompson in our discussions.

Mr. Phillips and I clearly agreed at the time that Ameritech would provide the real estate analysis and expertise upon which we could rely, in assessing these investments for the immunized fund. It was primarily on that basis and our review of the thinking behind that work that we made these investments. That the working files have disappeared presumably surprises you as well as us, and may well have created some suspicions which are coloring our discussions. I would prefer to address directly questions which seem to be in the background.

Is it possible that Messrs. Phillips and Thompson were working in areas beyond their authority? There was absolutely no basis for suspecting that was true, as we had open contacts with nearly all parties on Ameritech's investment staff and occasional contacts with those above. Not a hint of impropriety came to us through those contacts.

Is it possible that we were all misled by Salomon Brothers? Although I don't have any basis to believe so, it was Mr. Thompson and Mr. Phillips who undertook the substantive analysis with Salomon Brothers and to whom most of the representations were made. Clearly, Mr. Thompson's files and records would be the most objective source of such information. Lacking that, his cooperation in recalling



factual representations by Salomon seems essential, if that avenue is to be pursued.

Is it possible that NISA had some interest in conjunction with Mr. Thompson, Salomon Brothers, or parties undisclosed, that influenced this decision away from the best interests of the plan participants? I can assure you in the strongest possible manner that our one interest was the plan, period.

We diligently pursued the overriding investment objective set for us by Mr. Phillips. We agreed with the theme that a small measure of an inflation sensitive growth vehicle in the dedicated bond fund could improve its match with liabilities, especially in the light of the several benefit increases which we had experienced. We discussed, disagreed, and even argued about specific investments. We finally agreed on a specific investment and its appropriateness. That investment has, as it turns out, not met our expectations. But I firmly believe that the process of making it was sound. It arose from a strong, properly motivated joint interest in working for the success of the plan.

* * *

Sincerely,

/s/
Joseph E. Gorman

* * *

Meetings and Discussions Regarding Motels of America

The discussions surrounding the use of real estate-oriented securities in the dedicated fund began sometime around mid-year 1986. Interest rates on bonds had fallen from the 11-12% range when the portfolio had been assembled, to roughly the 7-8% range.

Don Phillips began to talk with us about the interest rate outlook for the next few years and it was hard to be as optimistic concerning the expected return from bonds at current levels compared to 1984-85. He made a case for real estate as a sector providing high expected returns and asked us to explore the variety of instruments that were then emerging. We had used Mortgage Pass-Throughs, both Project Loans and discount Ginnie Mae pools, to enhance return and diversify the portfolio from inception. He asked to look beyond those to some equity participations as a way to supplement return. Sometime in this period, we pointed out that we had no official authority to invest in private placements and that specific authority needed to be given before such investments were possible. On 8/19/86, we received new guidelines allowing 15% of the fund to be invested in unrated private placements, with a maximum of 2% with any one issuer. (A copy is attached)

On 10/21/86, we were asked to attend a meeting at Ameritech's headquarters where Salomon Brothers had prepared several alternative suggestions for the dedicated fund to participate in the higher yielding real estate transactions becoming available in the market. I had the impression this meeting was arranged to follow up on a seminar or some similar presentation in which Mr. Phillips or the Ameritech staff had previously participated. Three Salomon presenters were in attendance; Mark Field, Chicago Sales Manager; Steve Manolis, Director of Real Estate for Salomon and Todd (?), a real estate analyst. Don Phillips, Ken Feld and Joan Lee were present for Ameritech and Jeff Bryden and myself for NISA.

The thrust of the argument was that the trend toward securitization had no spread into commercial real estate and this opened opportunities for pension funds to enter areas that had been the exclusive domain of life insurers. Real estate



returns led the more marketable security sectors especially in inflationary times. Historic returns from Mortgages, and real estate equity participations, leveraged and unleveraged, rated and private, were reviewed.

Other conversations and meetings regarding this issue continued through 1986, the thrust of them being how Ameritech might add a margin of inflation protection and growth potential to the dedicated fund without significantly increasing the risk of not meeting its primary requirement. NISA played the role of a skeptical potential buyer to the arguments of brokerage firms, real estate specialists and Ameritech's staff.

* * *

Sometime in 1987, we were introduced to Mr. Thompson, a new Ameritech staff member recruited to begin to implement part of Ameritech's long range plan to add directed management of assets to their fiduciary role. Around the same period, staff members in other areas were being hired to prepare for direct management of stocks, bonds, short-term cash, as well as real estate. NISA was asked to do everything we could to help in this effort and were told we would eventually turn over assets to this growing in-house staff.

Meetings to discuss how real estate could be effectively used in the immunized fund to enhance potential return and diversify the asset base continued through this period and now included the inputs of Mr. Thompson, who was both an attorney and a real estate specialist. Leading up to October, we began to focus more on the equity portion of the real estate spectrum than on the mortgage portion as a potential investment. In nearly all of the analysis we had done, the debt portion of commercial real estate seemed to offer only narrow or no margin over comparable traditional debt, which

has better trading and security characteristics. Nearly all of the excess return from real estate transactions came from either the debt holder playing an equity role or from pure equity. Both Mr. Thompson and Mr. Phillips agreed with this conclusion and the focus became smaller, equity-oriented financings that would capture the higher return potential, but allow greater diversification in the mortgage portion. We would restrict the assets we invested to smaller percentages, so as to optimize potential return against the portion of immunized fund assets invested in this more uncertain environment.

On 10/20/87 for a specific date and in the period leading up to that date, we focused on a Motels of America financing fee agreement that Salomon Brothers had negotiated for their own account. The crash of October '87 caused them to look for a buyer or partner in the participation, so their maximum capital could be focused on security trading. Jeff Bryden and myself attended a meeting with Greg White of Salomon and Tom Thompson of Ameritech, where the elements of the transaction that had been tentatively structured between their staffs were explained and questioned. Prior conversations had been held between Don Phillips and myself where Don expressed a strong desire to place this transaction in the immunized fund. He viewed it as a zero coupon income bond with strong upside and little or no downside that became available because of special circumstances and with no sales commission - exactly the sort of investment he felt we should commit a small return-oriented portion of the fund to capture. We discussed at length our limited ability to analyze the real estate, location-oriented, appraisal-oriented, portion of the investment. He indicated Tom Thompson, Ameritech's real estate specialist, had done a thorough review with Salomon and was satisfied the investment was an excellent and rare opportunity from a real estate standpoint. He asked us to go over Tom's and Salomon's



analysis and to also determine that the risk involved appeared prudent inside the larger framework of the immunized fund. Don argued that some part of the outperformance of the dedicated fund to date should be committed to real estate as exemplified by the Motels of America proposal.

In the early days of the immunized fund, we had managed the fund so as to avoid adverse calls of scheduled cash flows and made changes that pursued what we considered value in the bond market. At the end of 1986, the performance calculations indicated we had added approximately 12% above the returns of the Salomon BIG Index. If the account averaged $2 billion in size through that period, that would represent some $240 million of value. The calculations against the liability also showed substantial outperformance.

At the 10/20 meeting, we discussed and analyzed the Company, its place in the industry, its management capability, the properties involved, appraised value, operating levels compared to their history and their industry, operating statements; projections (including some work by Thompson and White on ROR if a recession reduced rates and occupancy levels); what position we occupied with relation to secured lenders and equity owners, the relative uncertainty and seasonability of cash flows, and the expected range of 25%-14% IRR. In short, it was an extended analysis of the work already done by Salomon and Ameritech in which we satisfied ourselves that the analysis was thorough, professional and had risk/return characteristics in line with the objectives of the fund.

We insisted that Salomon retain an interest in the investment, since it was stated that all parties were relying upon them to monitor the accounting, collect the excess cash flow, and to review terminal values as part of the transaction. In short, they were to play a role similar to a lead bank in a syndicated

loan and part of the transaction was to compensate them for that service. At the end of the meeting, there was agreement to the transaction with some small truing up of a price yet to be worked out between Thompson and White.

Additionally, Salomon indicated they were working with the MOA organization on additional financing that would follow roughly the same format as the first.

* * *

Sometime in the months prior to 5/5/88, Don Phillips indicated they were working an another, smaller MOA fee agreement with Salomon Brothers that would closely resemble the first. We were asked to work with Mr. Thompson an the details. Our analysis followed nearly the same format as for MOA #1 and again we became convinced the new fee agreement fit the qualifications for the Company's interest and for our standards.

* * *

From mid '88 to the end of 1989, we looked at a variety of proposals, including an extensive investigation of a private placement financing for a landfill project in Ohio.

In September of 1989, NISA presented a proposal to use a newly developed technique called "Dedicated Stock Management" to supplement the dedicated bond portfolio. Using a newly developed Markowitz Optimizer, NISA proposed incorporating equity portfolios highly correlated with interest rates into the existing portfolio to boost return with little increase in risk. We were informed a new five year asset allocation plan had been approved and that it substantially reduced the domestic equity allocation and increased the commitment to real estate and venture capital. We were informed that Salomon was working an another MOA financing and that we could expect to participate if it



was completed and met our criteria. We were also informed that approval was expected for an in-house fund that was to gather all of the private placements and venture capital investments in-house so that Ameritech staff could take full responsibility. If approval came as expected, we would transfer the investments in MOA, United Savings & Loan, and other private placements.

Late in 1989, we indicated some administrative dissatisfaction with MOA 1 & 2, in that the accounting for and payment of cash flow due to the investments had not flowed as smoothly as anticipated when the investments were made. We also questioned Salomon's continued willingness to sell their participations since the extraordinary circumstances of October '87 had cleared up, and we had been led to believe they would prefer to hold these investments, given any choice. These discussions were first with Don Phillips in a phone conversation, most likely in November, and then repeated to Mr. Thompson when he called at Mr. Phillips' request.

We asked that the discussion of the new transaction be used to question the delay in cash flows on 1 & 2, and to re-check the economics of MOA. The response was that the cash flow mix-up was caused by a series of changes in their accounting personnel to accommodate the growth and that the new Cricket Inns were the most likely to appreciate of the three programs because current occupancy rates were well below the standards of MOA.

MOA had convinced Salomon and Mr. Thompson that they expected to expand those occupancy rates, some of which were depressed because of Hurricane Hugo, with all of the cash flows leverage that such a change would bring. We were told the past due cash flows would be forthcoming as quickly as the paper could be processed and that the

economics of MOA had improved with this acquisition and because of a $10 million junior preferred issue placed in strong investors' hands. Other operating ratios were discussed and Mr. Thompson concluded the MOA 3 proposal was in line with 1 & 2. On that basis, we agreed to participate. We were to follow up with Salomon to see that they straightened out the cash flow accounting and remittance with the Company, which we eventually believed we had accomplished. I do not recall talking directly to Salomon Bros. about the economics, but rather discussed them with Mr. Phillips and Mr. Thompson.

Mixed in with these discussions was another Salomon based potential transaction that would have involved a commitment of roughly $60 million, the Nichols Company out of Kansas City. Being a totally new type of real estate financing involving complicated economic and legal negotiations, we worked with Mr. Thompson and Ameritech's attorneys well into 1990 in assessing the proposed transaction. Some of the information regarding MOA was discussed during these sessions.

In March 1990, when we were working with Salomon regarding cash flows and original projections, we expressed a need to be updated on the accounting changes, the deviations from projected cash flows, and the current economics of the three financings. A meeting was arranged 5/21/90 at NISA, where Chuck Henry, Director-Finance, Salomon Bros. Real Estate, was to present a comprehensive update. Prior to this meeting, Ken Feld had discussed with NISA the proposed transfer of private placements to an in-house Ameritech fund. We invited Ken to participate in the review and update.

At the meeting, Mr. Henry reviewed the participation and MOA's position in the motel industry, detailing the evolving demand, price, and supply conditions of business and travel



motels. He reiterated that the economics of the MOA participation captured inflation effects over an approximate five year period, in addition to the basic value in the investment. He stressed that the refinancing which was to be expected at the five year point, was the primary focus of the investment and that the owner-operator is subordinate to Ameritech's position.

Salomon had been involved with MOA since 1987. Mr. Henry reiterated his conviction that the IRR would produce its original estimated 25% level. He then went through the accounting reports and answered questions. Two location problems were discussed relating to the Hurricane effects lasting longer than expected in one location, and reduction in military budget affecting another. Salomon was also currently questioning a higher than industry administrative expense ratio and would let us know the outcome.

Mr. Henry's conclusions were that the problems to date were identified, understood, in the process of being managed, and were not expected to significantly affect the ultimate value of the investment. He stressed again, the need to look to the 1992 refinancing date for the ultimate value of the investment.

We asked for a specific review of the three financings. He said MOA #1 was essentially slightly better than breaking even, MOA 2 was making good money and MOA 3 was breaking even.

NISA asked that an extra copy of all financial reports be forwarded directly to us in the future and the meeting ended.

Joseph E. Gorman
November 7, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Phillips Deposition Exhibit 119 (Assignment of Participation Interest in Fee Agreement I)**

(R. 243) (Sal. C.A. App. 481-83)

ASSIGNMENT dated as of October 28, 1987, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of July 31, 1987 (the "Agreement"), between Motels of America Inc., a Delaware corporation ("MOA"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since July 31, 1987.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $6,365,000.



3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 95% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of MOA and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 95% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 3 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the day of October, 1987.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,
By [Signature]
Name: A.W. Burnett
Title: Vice President

SALOMON BROTHERS INC,
By [Signature]
Name: Gregory R. White
Title: Director



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Phillips Deposition Exhibit 120 (Assignment of Participation Interest in Fee Agreement II)**

(R. 243) (Sal. C.A. App. 484-86)

ASSIGNMENT dated as of April 28, 1988, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of March 10, 1988 (the "Agreement"), between Motels of America Inc., a Delaware corporation ("MOA"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 100% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a 100% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since March 10, 1988.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $2,200,000.00.

3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 100% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of MOA and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 100% undivided interest in all the Assignor's right, title and



interest under the Agreement, except as expressly set forth in Section 3 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the ___ day of April, 1988.

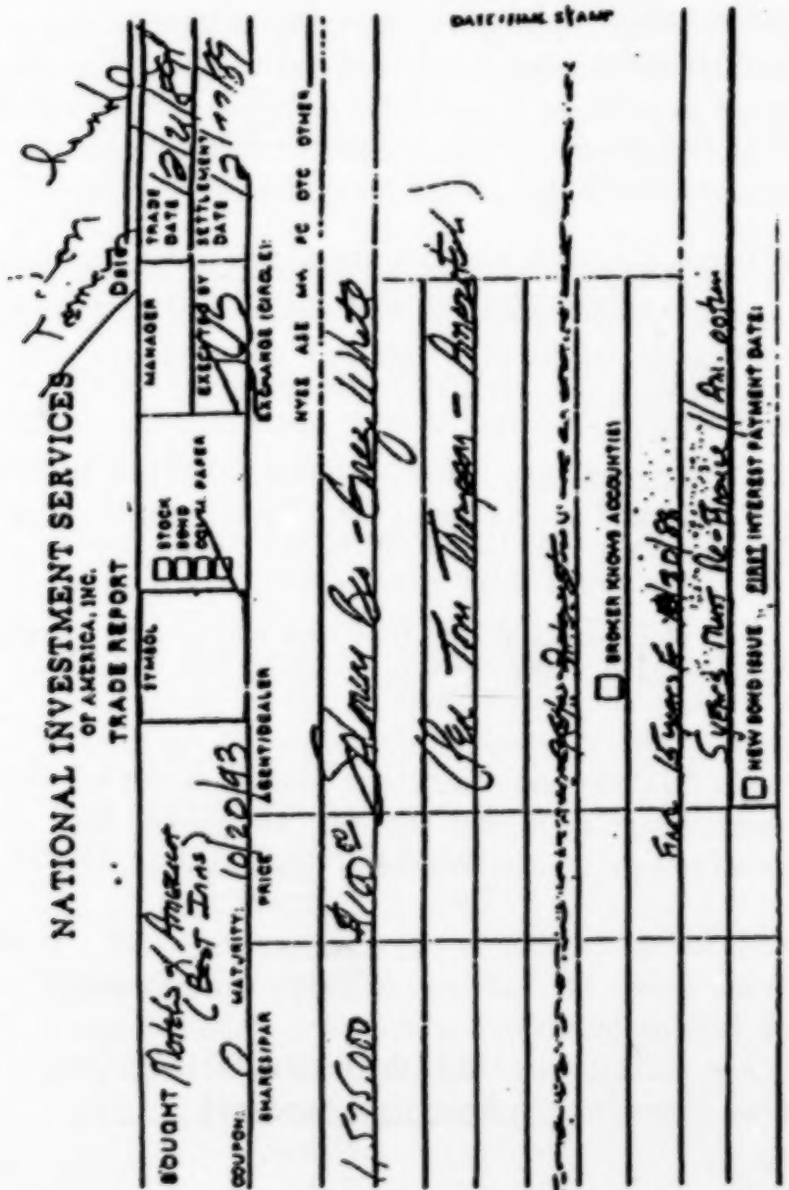
HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,
By _____[Signature]_____
Name: A. W. Burnett
Title: Vice President

SALOMON BROTHERS INC,
By _____[Signature]_____
Name:
Title:

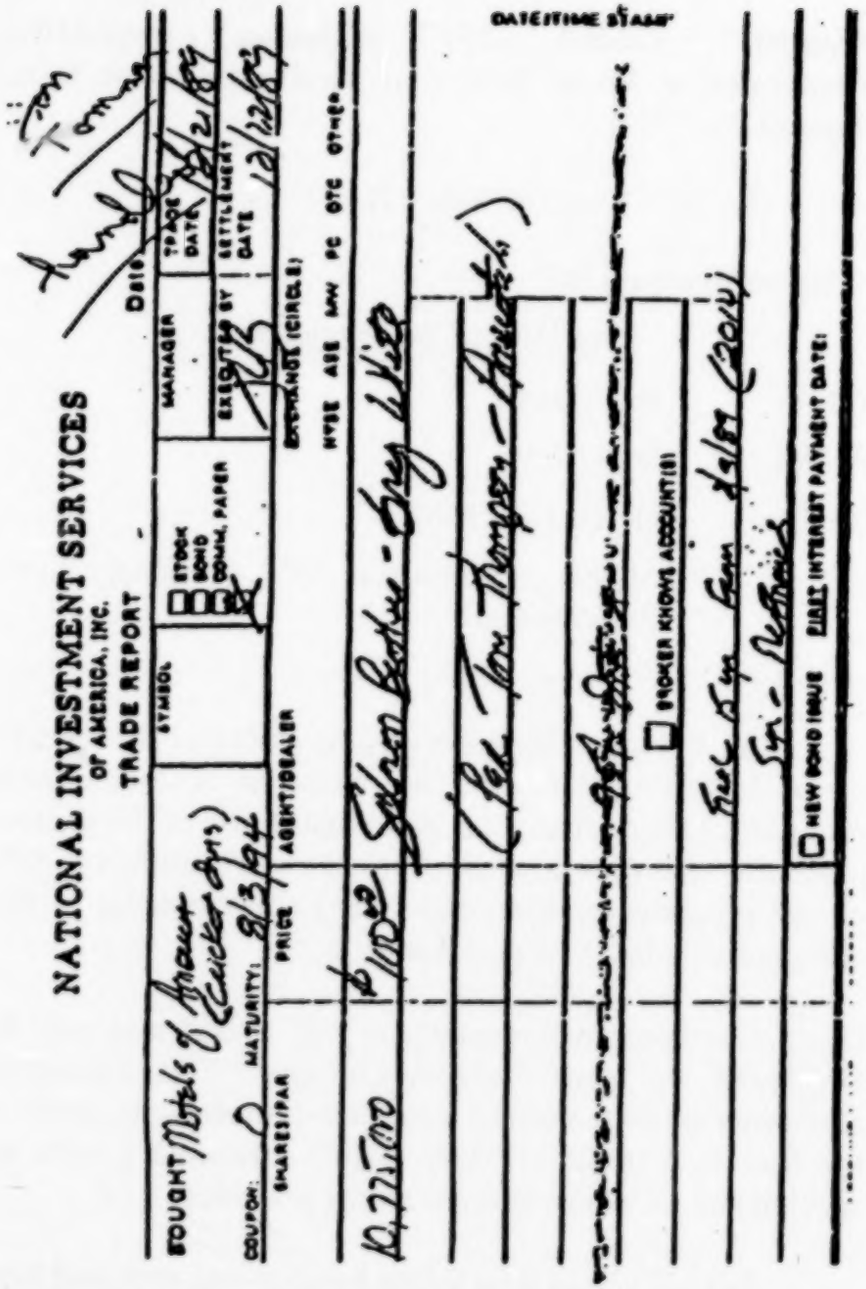
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Phillips Deposition Exhibit 134 (Trade Reports for Portfolio III and IV Participation Interest Transactions)**

(R. 243) (Sal. C.A. App. 741-42) (Excerpts)


NATIONAL INVESTMENT SERVICES
OF AMERICA, INC.
TRADE REPORT
DATE/TIME STAMP
BOUGHT Motels of America (East Ins) 10/20/93
COUPON: 0 MATURITY: PRICE AGENT/DEALER
SHARES/PAR
STOCK BOND COMM. PAPER
MANAGER
EXECUTED BY
TRADE DATE 12/21/93
SETTLEMENT DATE 12/23/93
EXCHANGE (CIRCLE):
NYSE ASE MW PC OTC OTHER
BROKER KNOWS ACCOUNT(S)
NEW BOND ISSUE FIRST INTEREST PAYMENT DATE:

* * *


NATIONAL INVESTMENT SERVICES
OF AMERICA, INC.
TRADE REPORT
DATE/TIME STAMP
BOUGHT Motels of America (Excelsior Ins) 8/3/94
COUPON: 0 MATURITY: PRICE AGENT/DEALER
SHARES/PAR
STOCK BOND COMM. PAPER
MANAGER
EXECUTED BY
TRADE DATE 8/3/94
SETTLEMENT DATE 8/5/94
EXCHANGE (CIRCLE):
NYSE ASE MW PC OTC OTHER
BROKER KNOWS ACCOUNT(S)
NEW BOND ISSUE FIRST INTEREST PAYMENT DATE:

* * *

BEST AVAILABLE COPY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Plaintiffs' Exhibit 251 (Salomon Inter-Office Memorandum From Will Clay to Jim Massey, Dated October 28, 1987)**

(R. 243: Plaintiffs' Exh. 251)

**Salomon Brothers Inc**

Inter-Office Correspondence

TO: Jim Massey

FROM: Will Clay

DATE: October 28, 1987

RE: Motels of America 35% Residual Equity Participation

---

As a result of underwriting as principal the recently issued Motels of America debt, Salomon Brothers Realty received a 35% participation in the cash flows of the 45 hotel properties after debt service. As well we are entitled to 35% of sale proceeds (or appraised value) after payment of first mortgage debt in 5 years (at maturity).

Our basis in this equity is "$0" and it was sold for $6,365,000 by Mark Field of Chicago. This transaction represents an extraordinary sales achievement and profit to the firm as a result of Mark Field's relationship with his account and his desire to focus on our priorities.

Greg White of Real Estate Finance was involved from the beginning and was instrumental along with Mark in making this sale.



Thank you.

cc: Bill McIntosh
Patrick Dunlavy
Steve Manolis

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 5 (Assignment of Participation Interest in Fee Agreement III)**

(R. 243) (Sal. C.A. App. 487-89)

ASSIGNMENT dated as of December 22, 1989, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of August 3, 1989 (the "Agreement"), between Motels of America Inc., a Delaware corporation ("MOA"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since August 3, 1989.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $10,775,000.



3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 95% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of MOA and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 95% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 9 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.

IN WITNESS WHEREOF, the parties have hereunto set their hands as of the 22nd day of December, 1989.



HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,

By [Signature]
Name: Jon Toman
Title: Trust Officer

SALOMON BROTHERS INC,

By [Signature]
Name: Greg White
Title: Managing Director

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 6 (Assignment of Participation Interest in Fee Agreement IV)**

(R. 243) (Sal. C.A. App. 490-92)

ASSIGNMENT dated as of December 22, 1989, by SALOMON BROTHERS INC (the "Assignor") to HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST (the "Assignee").

WHEREAS, the Assignor entered into a Fee Agreement dated as of October 20, 1988 (the "Agreement"), between BEST INNS, INC., a Kansas corporation ("INNS"), and the Assignor, a copy of which is attached hereto as Exhibit A; and

WHEREAS, the Assignor desires to assign to the Assignee, and the Assignee desires to acquire from the Assignor, a 95% undivided interest in all the Assignor's right, title and interest under the Agreement on the terms and conditions set forth in this Assignment.

NOW, THEREFORE, in consideration of the premises, the parties hereto agree as follows:

1. Assignment. The Assignor hereby assigns and transfers to the Assignee and its successors and assigns, forever, a __% undivided interest in all the Assignor's right, title and interest under the Agreement, including but not limited to any amounts owed or accrued since September 30, 1989.

2. Consideration. In consideration of the aforesaid assignment and transfer, the Assignee agrees to pay to the Assignor, by certified or official bank check or wire transfer of immediately available funds, the sum of $1,575,000.



3. Representations and Warranties of Assignor. The Assignor represents and warrants to and agrees with the Assignee as follows:

(a) The copy of the Agreement attached hereto as Exhibit A is a true, correct and complete copy of the Agreement. The Assignor has neither amended, modified or terminated the Agreement, nor assigned or otherwise transferred any of its rights under the Agreement except pursuant to this Assignment.

(b) This Assignment has been duly authorized, executed and delivered by the Assignor.

(c) To the best of the Assignor's knowledge, there is no default under the Agreement.

4. Representations and Warranties of Assignee. The Assignee represents and warrants to and agrees with the Assignor as follows:

(a) This Assignment has been duly authorized, executed and delivered by the Assignee.

(b) The Assignee is acquiring a 95% undivided interest in all the Assignor's right, title and interest under the Agreement for its own account as principal for the purpose of investment and not with a view to the distribution or resale thereof in any manner that would violate any Federal or state securities law(s).

(c) The Assignee has conducted an independent investigation of INNS and has not relied upon any representation or warranty, express or implied, by the Assignor in connection with its acquisition of a 95% undivided interest in all the Assignor's right, title and

interest under the Agreement, except as expressly set forth in Section 9 of this Assignment.

5. Entire Agreement. This Assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

6. Counterparts. This Assignment may be executed in two or more counterparts, each of which shall be deemed to be an original, but all of which shall constitute one and the same agreement.

7. Governing Law. This Assignment shall be governed by and construed in accordance with the laws of the State of New York.



IN WITNESS WHEREOF, the parties have hereunto set their hands as of the 22nd day of December, 1989.

HARRIS TRUST AND SAVINGS BANK, AS TRUSTEE FOR THE AMERITECH PENSION TRUST,

By [Signature]
Name:
Title:

SALOMON BROTHERS INC,

By [Signature]
Name: Greg White
Title: Managing Director

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 18 (J. Gorman of NISA Letter to G. White of Salomon Regarding Portfolio I Participation Interest, dated October 27, 1987)**

(R. 243) (Sal. C.A. App. 758-59, at 758)

[NISA Letterhead]

Joseph B. Gorman
President

October 27, 1987

Mr. Greg White
Director
Salomon Brothers, Inc.
One New York Plaza
New York, New York 10004

Dear Mr. White:

Per your prior agreement with Ameritech, we affirm your assignment of a 95% undivided interest in Salomon Brothers, Inc. fee agreement with Motels of America, Inc. dated 7/31/87 for the Ameritech account.

As negotiated by Ameritech's Mr. Thompson, the price for the 95% undivided interest has been set at $6,365,000 with settlement and transfer of funds to take place on or after October 28, 1987.

A copy of this affirmation will be forwarded to Harris Bank and Trust, who as custodians for Ameritech will provide for a transfer of funds once satisfied with delivery of and execution of the assignment documents.



Sincerely,

/s/ Joseph B. Gorman

Joseph B. Gorman

JEG:lk

cc: Mr. Bill Burnett
Harris Bank and Trust, Chicago

Mr. Tom Thompson
Ameritech, Chicago

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 32 (J. Bryden of NISA Letter to G. White of Salomon Regarding Portfolio II Participation Interest, dated May 5, 1988)**

(R. 243) (Sal. C.A. App. 760-68, at 760)

[NISA Letterhead]

Jeffrey L. Bryden
Vice President

May 5, 1988

Mr. Greg White
Director
Salomon Brothers, Inc.
One New York Plaza
New York, New York 10004

Dear Mr. White:

Per your prior agreement with Ameritech, we affirm your assignment of a 100% undivided interest in Salomon Brothers, Inc. fee agreement with Motels of America, Inc. dated 3/10/88 for the Ameritech account.

As negotiated by Ameritech's Mr. Thompson, the price for the 100% undivided interest has been set at $2,200,000 with settlement and transfer of funds to take place on or after May 5, 1988.

A copy of this affirmation will be forwarded to Harris Bank and Trust who, as custodians for Ameritech, will provide for a transfer of funds once satisfied with delivery of and execution of the assignment documents.



Sincerely,

/s/ Jeffrey L. Bryden

Jeffrey L. Bryden, CFA

JLB:crs

cc: Mr. Bill Burnett
Harris Bank and Trust, Chicago

Mr. Tom Thompson
Ameritech, Chicago

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 36 (Letter Notifying MOA of Assignment of Participation Interest in Fee Agreement II)**

(R. 243)

April 28, 1998

Motels of America Inc.
6153 Fairmount Avenue
San Diego, CA 92110

Attention: Mr. Guy E. Hatfield

Dear Sirs:

As per the Assignment dated as of April 28, 1988 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 100% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of March 10, 1988 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since March 10, 1988. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 6 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor pursuant



to the Fee Agreement shall hereafter be paid 100% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

Pursuant to paragraph 11 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 3 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Charles S. Henry

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603
for the attention of Mr. A. William Burnett,
as Trustee for Ameritech Pension Trust

with copies to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments

10 South Wacker Drive – 24th floor
Chicago, Illinois 60606

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Managing Director

Agreed to and acknowledged as
of the date set forth above:

MOTELS OF AMERICA INC.,

By_____
Name:
Title:

HARRIS TRUST AND SAVINGS BANK,
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: A. W. Burnett
Title: Vice President



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 37 (Letter Notifying MOA of Assignment of Participation Interest in Fee Agreement III)**

(R. 243)

December 22, 1989

Motels of America Inc.
6153 Fairmount Avenue
San Diego, CA 92110

Attention: Mr. Guy E. Hatfield

Dear Sirs:

As per the Assignment dated as of December 22, 1989 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 95% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of August 3, 1989 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since August 3, 1989. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 13 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor pursuant to the Fee Agreement shall hereafter be paid 95% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

The remaining 5% of the Fees payable to the Assignor pursuant to the Fee Agreement shall continue to be payable to the Assignor in accordance with subparagraphs 3, 4 and 5 of the Fee Agreement.

Pursuant to paragraph 18 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 9 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Gregory A. White
Mr. Charles S. Henry

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603



for the attention of Mr. A. William Burnett,
as Trustee for Ameritech Pension Trust

with copies to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments
10 South Wacker Drive – 24th floor
Chicago, Illinois 60606

Mr. Jeffrey L. Bryden
National Investment Services of America, Inc.
815 East Mason Street
Suite 1501
P.O. Box 2143
Milwaukee, Wisconsin 53201

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Managing Director

Agreed to and acknowledged as
of the date set forth above:

MOTELS OF AMERICA INC.,

By [Signature]
Name: Mark T. Livingston
Title: President/CEO

HARRIS TRUST AND SAVINGS BANK, not individually, but solely
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: Jon K. Toman
Title: Trust Officer



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 39 (Letter Notifying MOA of Assignment of Participation Interest in Fee Agreement I)**

(R. 243)

October 28, 1987

Motels of America Inc.
6153 Fairmount Avenue
San Diego, California 92110

Attention: Mr. Guy E. Hatfield

Dear Sirs:

As per the Assignment dated as of October 28, 1987 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 95% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of July 31, 1987 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since July 31, 1987. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 6 of the Fee Agreement.

You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor

pursuant to the Fee Agreement shall hereafter be paid 95% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

The remaining 5% of the Fees payable to the Assignor pursuant to the Fee Agreement shall continue to be payable to the Assignor in accordance with subparagraph 1(i) of the Fee Agreement.

Pursuant to paragraph 11 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 3 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Charles S. Henry

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603
for the attention of: Mr. A. William Burnett,
as Trustee for Ameritech Pension Trust

with a copy to:



Mr. L.B. Thompson
Ameritech
Director Real Estate Investments
10 South Wacker Drive – 24th floor
Chicago, Illinois 60606

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Director

Agreed to and acknowledged as
of the date set forth above:

MOTELS OF AMERICA, INC.

By [Signature]
Name:
Title:

HARRIS TRUST AND SAVINGS BANK,
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: A.W. Burnett
Title: Vice President

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Thompson Deposition Exhibit 230 (Letter Notifying Best Inns of Assignment of Participation Interest in Fee Agreement IV)**

(R. 243)

December 22, 1989

Best Inns, Inc.
7101 College Boulevard (Suite 2100)
Overland Park, Kansas

Attention: Mr. Gregory A. Miller

Dear Sirs:

As per the Assignment dated as of December 22, 1989 (the "Assignment"), by Salomon Brothers Inc (the "Assignor") to Harris Trust and Savings Bank, as Trustee for the Ameritech Pension Trust (the "Assignee") (a copy of which is attached hereto as Exhibit A), the Assignor has heretofore assigned and transferred to the Assignee and its successors and assigns a 95% undivided interest in all the Assignor's right, title and interest under that certain Fee Agreement dated as of October 20, 1988 (the "Fee Agreement"), between you and the Assignor, including but not limited to any amounts owed or accrued since October 1, 1989. A copy of the Fee Agreement is attached to the Assignment. The Assignment was executed pursuant to paragraph 12 of the Fee Agreement.



You hereby are notified by the Assignor that the Fees (as defined in the Assignment) payable to the Assignor pursuant to the Fee Agreement shall hereafter be paid 95% to the Assignee by wire transfer of immediately available funds to the following account:

Harris Trust and Savings Bank
for credit to Ameritech Pension Trust
Account Number 70707
Attention: Mr. A. William Burnett

The remaining 5% of the Fees payable to the Assignor pursuant to the Fee Agreement shall continue to be payable to the Assignor in accordance with subparagraphs 3, 4 and 5 of the Fee Agreement.

Pursuant to paragraph 17 of the Fee Agreement, you are hereby directed to send all documentation, including without limitation notices, financial statements, requests, etc. (including without limitation all copies of itemized statements pursuant to paragraph 9 of the Fee Agreement), to each of the following:

To the Assignor, at:

Salomon Brothers Inc
Two New York Plaza
New York, NY 10004

Attention: Mr. Gregory A. White
Mr. Kevin Shields

To the Assignee, at:

Harris Trust and Savings Bank
111 West Monroe Street
Chicago, Illinois 60603

for the attention of: Mr. A. William Burnett,
As Trustee for Ameritech Pension Trust

with copies to:

Mr. L.B. Thompson
Ameritech
Director Real Estate Investments
10 South Wacker Drive – 24th floor
Chicago, IL 60606

Mr. Jeffrey L. Bryden
National Investment Services of America, Inc.
815 East Mason Street
Suite 1501
P.O. Box 2143
Milwaukee, Wisconsin 53201

Very truly yours,

SALOMON BROTHERS INC.

By [Signature]
Name: Gregory A. White
Title: Managing Director

Agreed to and acknowledged as
of the date set forth above:

BEST INNS, INC.

By [Signature]
Name: Greg Miller
Title: President



HARRIS TRUST AND SAVINGS BANK, NOT
INDIVIDUALLY, BUT SOLELY
AS TRUSTEE FOR THE AMERITECH PENSION TRUST

By [Signature]
Name: Jon K. Toman
Title: Trust Officer

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Charles C. Jackson, Counsel to Plaintiffs, Letter to Peter C. Hein, Counsel to Defendants, dated May 2, 1994**

(R. 243) (Sal. C.A. App. 790-93, at 790-91) (Excerpts)

[Letterhead of Seyfarth, Shaw, Fairweather & Geraldson]

* * *

This is in response to your letters of March 21, 1994 to Sandy Walton and me regarding various evidentiary issues, and also to provide you with copies of our responses to your discovery requests and APT's privilege log.

* * *

**B. Issue Of Joint Privilege As Between NISA And APT.**

* * *

By the summer of 1991, NISA and APT were cooperating regarding the settlement of any claims in the Motels of America bankruptcy. By August of 1991, and probably earlier, APT and NISA were jointly cooperating with respect to filing litigation against Salomon Brothers.

* * *



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Salomon's 12N Statement in Response to Plaintiffs' 12(m) Statement, dated July 11, 1995**

(R. 143) (*See* Salomon's Reply Appendix in the Court of Appeals, at RA329, RA335, RA449-50, RA461, RA501) (Excerpts)

* * *

Salomon's Response to ¶ 186:

* * *

(b) Object on the grounds that Winston's personal views are in any event inadmissible in that they constitute personal opinions without any proper foundation:

* * *

Salomon's Response to ¶ 187:

* * *

(b) Object on the grounds that Livingston's personal views are in any event inadmissible in that they constitute personal opinions without any proper foundation:

* * *

Salomon's Response to ¶ 244:

* * *

(b) Object to Mares Ex. 395, a November 7, 1990 letter to Mares with attachment.

(i) As set forth in Defendants' Memorandum of Law in Support of Objections to Evidentiary Matters Offered in Plaintiffs' 12(M) statement, Point III, Mares Ex. 395 is hearsay and there is no available exemption.

* * *

**SALOMON 12N PART II**

* * *

g. There was no agreement by Salomon to monitor the participation interests on behalf of APT.

410. Salomon objects to plaintiffs' assertion that there was some agreement by Salomon to monitor on behalf of APT on the grounds that no such agreement to monitor was included in the Assignments; the Assignments expressly recited in Section 5 that they "constitute[ ] the entire agreement between the parties with respect to the subject matter hereof and supersede[ ] all other prior agreements and understandings, both written and oral"; and thus any supposed oral agreement is barred by the parol evidence rule. See Defendants' Memorandum of Law in Support of Objections to Evidentiary Matters Offered in Plaintiffs' 12(m) Statement Point I.

* * *



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

**Composite Document Which Includes (1) Defendants' 12(m) Statement, (2) Plaintiffs' 12N Responses Thereto, and (3) Defendants' Objections to Certain Evidence Contained in Plaintiffs' 12N Responses and Replies to Plaintiffs' 12N(3)(B) Assertions**

(R.173, 176) (Sal. C.A. App. 343-410, at 354 ) (Excerpts)

* * *

Salomon 12(m) Statement ¶ 4

4. Ameritech's pension plans are noncontributory, defined benefit plans, and thus no Ameritech employee ever contributed any money to these plans. Phillips Dep. 253(22)-254(8). Ameritech is obliged to pay fixed benefits irrespective of the investment performance of APT, and any losses suffered by APT based on poor investment performance are borne by Ameritech, not its retirees. Phillips Dep. 256(l)-258(4), 259(17-21); Feld Dep. 407(3)-408(7); Edwardson Dep. 133(23)-136(11). Specifically, any losses which APT may have suffered with respect to the participation interest investments did not cost any Ameritech employee or retiree any money. Phillips Dep. 259(17-21).

Plaintiffs' 12N(3)(a) Response to ¶ 4

According to Salomon (Stmt. p. 1), the noncontributory nature of the Ameritech Pension Plan and Ameritech Management Pension Plan, and Ameritech's obligation to contribute and bear losses "are not themselves essential to the grounds on which Salomon seeks summary judgment." Answering further, admit that Salomon accurately reflects the

record, but deny that the noncontributory nature of the Ameritech Pension Plan and Ameritech Management Pension Plan, and Ameritech's obligation to contribute and bear losses, are relevant or material to Salomon's motion or obligations under ERISA or State law. Whether the Pension Trust could afford to be swindled is not relevant.



**Complaint in *Spink* v. *Lockheed Corp.*, Case No. 92-800 SVW (C.D. Cal.)**

(Included in R. 197) (Sal. C.A. App. 275-284b, at 276b-79b, 280a-82a, 283b-84b) (Excerpts)

## NATURE OF THE ACTION

1. This is a class action brought by PAUL L. SPINK (hereafter "Spink" or "plaintiff") against LOCKHEED CORPORATION and various divisions, departments, affiliates and/or subsidiaries thereof, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"), and related defendants, pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001, *et seq.*, and the Age Discrimination In Employment Act ("ADEA"), 29 U.S.C. §§ 621, *et seq.*

2. Spink brings claims under ERISA for himself and on behalf of similarly situated persons to enforce the terms of Lockheed's pension plan, to redress violations of the provisions of ERISA, and to remedy breaches of fiduciary duty by the plan administrators. Under ERISA, Spink alleges that defendants have violated and continue to violate ERISA by denying full pension benefits to him and a class of similarly situated persons because of their age, and by breaching their fiduciary duties to Spink and the plaintiff class by using millions of dollars of pension plan funds to obtain a release of various employment related claims of employees against the plan sponsor concurrently with the massive layoff of the plan sponsor's employees, all to the benefit of Lockheed, not the Plan.

* * *

## FACTS COMMON TO ALL CAUSES OF ACTION

* * *

8. Plaintiff Paul L. Spink ("Spink") was, during periods of time from in or about 1939 through June 30, 1990, an employee of various divisions, departments, affiliates, and/or subsidiaries of defendant Lockheed Corporation. Plaintiff is a participant in the Lockheed Retirement Plan For Certain Salaried Employees ("Plan"), within the meaning of Section 3(7) of ERISA, 29 U.S.C. § 1002(7), and is currently receiving benefits from the Plan.

9. Defendant Lockheed Corporation is a Delaware corporation doing business as an aerospace manufacturer in the State of California and throughout the United States, under its own name and under the name of its various divisions, departments, affiliates and/or subsidiaries, including but not limited to LOCKHEED AERONAUTICAL SYSTEMS COMPANY, LOCKHEED CALIFORNIA COMPANY, and/or LOCKHEED ADVANCED DEVELOPMENT PROJECTS (hereinafter collectively referred to as "Lockheed"). Lockheed is an "employer" engaged in commerce and is the Plan Sponsor, as that term is used in ERISA, and is an "employer" within the meaning of and subject to the provisions of the ADEA. As the Plan Sponsor, Lockheed was responsible for the appointment and retention of individuals to the Retirement Plan committee to administer the Plan, among other things. In addition, Defendant Lockheed was responsible at all material times for interpreting and implementing the terms of the Plan, including ensuring the Plan complied with all applicable federal and state laws. Defendant Lockheed had actual control of Plan assets. Therefore, Defendant Lockheed was at all material times a "fiduciary" within the meaning of Section 3(21)(A) of ERISA, 29 U.S.C. § 1002(21)(A).



Defendant Lockheed is also a "party in interest" within the meaning of Section 3(14) of ERISA, 29 U.S.C. § 1002(14).

10. Defendant Daniel M. Tellep ("Tellep") was at all material times Chairperson of the Board and Chief Executive Officer of Defendant Lockheed. Tellep was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A) with respect to the Plan.

11. Defendant Robert A. Fuhrman ("Fuhrman") was at all material times through April 1, 1990, Vice Chairperson of the Board and Chief Operating Officer of Defendant Lockheed. Fuhrman was at all material times through April 1, 1990, a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A) with respect to the Plan.

12. Defendant Vincent N. Marafino ("Marafino") was at all material times Chairperson of the Board and Chief Financial and Administrative Officer of Defendant Lockheed. Marafino was at all material times a "fiduciary" and a "party in interest" within the meaning of ERISA §§ 3(14) and (21)(A), 29 U.S.C. §§ 1002(14) and 1002(21)(A) with respect to the Plan.

13. Defendant K.H. Anderson ("Anderson") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Anderson was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

14. Defendant L.J. Barnard ("Barnard") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Barnard was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

15. Defendant R.W. Berry ("Berry") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. R. W. Berry was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

16. Defendant P.N. Braunagel ("Braunagel") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Braunagel was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

17. Defendant D.L. Bronco ("Bronco") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Bronco was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

18. Defendant R.H. Northcutt ("Northcutt") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Northcutt was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

19. Defendant W.E. Skowronski ("Skowronski") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Skowronski was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

20. Defendant A.G. Van Shaick ("Van Shaick") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Van Shaick was at all material times a



"fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A) with respect to the Plan.

21. Defendant W.T. Vincent ("Vincent") was at all material times a member of the Retirement Plan Committee of the Plan and a senior officer and employee of Defendant Lockheed. Vincent was at all material times a "fiduciary" within the meaning of ERISA § 3(21)(A), 29 U.S.C. § 1002 (21)(A) with respect to the Plan.

22. At all material times, Bankers Trust Company ("Bankers") was the Trustee and Custodian of the assets of the Plan. Bankers holds the assets of the Plan and performs as trustee pursuant to the Plan's Trust Agreement.

* * *

24. The Plan, which has been in effect for many years, was restated effective August 5. 1985, and has been amended from time to time. The Plan is a defined benefit non-contributory plan that covers substantially all salaried employees of the participating companies, which include Defendant Lockheed Corporation, its departments, divisions, affiliates and subsidiaries. Employees who are eligible to participate in the Plan receive benefits upon their retirement, death, or disability in accordance with the terms of the Plan. Upon information and belief, during the relevant period the Plan had in excess of $1 billion surplus of assets above those needed for funding requirements under the Plan.

25. According to the Plan's terms, the Plan is governed by federal law, the Trust Agreement and the Plan document itself. The Plan is administered by the Retirement Plan Committee ("Committee"), which Committee has the responsibility and legal authority to control the Plan's operation and administration in accordance with the terms of the Plan Document and Trust Agreement, including the exercise of all fiduciary functions provided for in either the Plan Document or the Trust Agreement as are necessary to

the Plan's administration and operation. By resolution of its Board of Directors, the plan sponsor, Defendant Lockheed had authority to appoint and/or approve the Committee's membership.

* * *

**COUNT III**
**BREACH OF FIDUCIARY DUTY UNDER ERISA SECTION 404 AND 406 OF ERISA, 29 U.S.C. §§ 1104 AND 1106**
(Class Claim)

55. Spink restates and realleges and incorporates by this reference Paragraphs 1 through 34, inclusive, as though fully set forth herein.

56. Spink brings this claim on his own behalf and on behalf of a class of similarly situated persons under Section 502(a)(2) and (3), 29 U.S.C. §§ 1132(a)(2) and (3).

57. In 1989 and early 1990, Lockheed's management engaged in a contest for control of the corporation with Harold Simmons and NL Industries, Inc. ("Simmons/NLI"), which resulted ultimately in both Lockheed and Simmons/NLI spending hundreds of millions of dollar in a takeover battle and an attendant proxy fight. During this struggle for the corporate control of Lockheed, among other misconduct, Lockheed management and Plan fiduciaries manipulated various Plan assets for their own benefit and for the benefit of Lockheed in violation of their duties under the Plan Document, Trust Agreement and ERISA not to use or divert Plan assets for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries. Such actions were taken with the knowledge and consent of defendant Lockheed in violation of its duties as Plan Sponsor to see that Plan assets are used solely in the interests of Plan participants and their beneficiaries.



58. After a lengthy and heated battle and in response to continued fears of takeover efforts by Simmons/NLI, defendant Lockheed undertook a major reorganization at its Board of Directors meeting on or about May 8, 1990, allegedly in an effort to make its aeronautical systems business more competitive and profitable by streamlining its operations. One portion of this streamlining involved consolidating the company's Southern California operations in Georgia, which move involved nearly total elimination of defendant Lockheed's Burbank facilities over the next several years. At the time of the May Board meeting, defendant Lockheed estimated that close to 3000 employees, most of whom were then located at the Burbank facility, would be laid off by late June, 1990.

59. In order to carry out these plans, defendant Lockheed passed Plan amendments at the May 8 Board of Directors meeting, which amendments provided for a Special Retirement Opportunity ("SRO") and a 1990 Voluntary Retirement Program ("VRP"). These options were then made available to certain groups of individuals until June 30, 1990. To be eligible, a Lockheed employee had to hold a salaried position within one of the relevant groups and be on the active payroll or on leave between May 8 and June 30, 1990.

60. The SRO and VRP options offered eligible employees incentives in the form of increased benefits upon retirement to take certain specified employment-related actions. Except for certain identified individuals whose continued employment was deemed important in meeting defendant Lockheed's operational requirements, virtually all persons eligible for normal or early retirement under the existing Plan were given opportunities to participate in the SRO and VRP. However, in exchange for the exercise of this early retirement option, the eligible employee/participant was required to release and discharge the defendant Lockheed from almost all claims arising out of, or in any way

related to, her/his employment with defendant Lockheed or the termination of that employment and to refrain from participating in any lawsuit to assert any such claims. Additionally, the company required eligible employees and participants to indemnify and hold defendant Lockheed harmless from all loss or damage, including attorney's fees, arising out of the breach of any release. The benefits paid under the SRO and VRP were and continue to be funded almost entirely by surplus Plan assets, assets which are currently held in trust for the sole and exclusive benefit of the Plan's participants and beneficiaries. Thus, the Plan's assets were used at least in part by defendant Lockheed to relieve itself of various liabilities or potential liabilities to thousands of its employees.

61. Defendants Lockheed, Tellep, Fuhrman and Marafino violated ERISA by adopting the May 8, 1990 amendments which provided for the SRO and VRP options in that this action misused Plan assets by manipulating those assets for the benefit of defendant Lockheed. Defendant Lockheed failed to discharge its duties as Plan Sponsor solely in the interest of participants and their beneficiaries in violation of the provisions of the Plan, Trust Agreement, and ERISA, all of which prohibit the use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of Plan participants and their beneficiaries.

62. Defendants Anderson, Barnard, Berry, Braunagel, Bronco, Northcutt, Skowronski, Van Shaick, and Vincent knew or should have known that the SRO and VRP options adopted as Plan amendments on May 8, 1990, constituted a use of Plan assets for Defendant Lockheed. Said individual defendants were required to act so as to promptly terminate the misuse of surplus Plan assets by Defendant Lockheed but failed to do so. Instead, acting as Plan fiduciaries, said individual defendants implemented these Plan amendments by requiring participants to execute Settlement Agreements



and Releases of claims against Defendant Lockheed to obtain the SRO and VRP benefits outlined above.

63. Each of the defendants, who participated in adopting, or were acting as fiduciaries with respect to the Plan in implementing the SRO and VRP amendments to the Plan, which misused surplus Plan assets by manipulating those assets for the benefit of Defendant Lockheed, violated ERISA in the following respects:

a. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries of the Plan and by failing to discharge their duties for the exclusive purpose of providing benefits to Plan participants and their beneficiaries in violation of ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1);

b. By failing to discharge their duties with respect to the Plan solely in the interest of the Plan participants and beneficiaries with the care, skill, prudence and diligence under circumstances that a prudent person acting in a like capacity and familiar with these matters would use in the conduct of an enterprise with the character and aims like those of the Plan in violation of ERISA § 404(a)(1)(B), 29 U.S.C. § 1104(a)(1)(B);

c. By failing to discharge their duties with respect to the Plan solely in the interest of the participants and beneficiaries in violation of the Provisions in the Plan and Trust Agreement prohibiting use or diversion of any Plan funds for any purpose other than for the sole and exclusive benefit of the Plan participants and beneficiaries in violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D); and

d. By causing the Plan to engage in a transaction which they knew or should have known constituted a direct or indirect use of the Plan for the benefit of a party in interest (Defendant Lockheed) in violation of ERISA §§ 406(a) and (b), 29 U.S.C. §§ 1106 (a) and (b).

64. Defendants Lockheed, Tellep, Fuhrman and Marafino, by virtue of their status as a parties in interest and/or fiduciaries with respect to the Plan under ERISA, Sections 3(14) (21)(A), 29 U.S.C. 1002(14)(21)(A), and any other of the defendants who are found liable for breaches of duty during their tenure as Plan fiduciaries, are personally liable to make restitution to the Plan for the value of the use of Plan assets resulting from any such breach and to restore to the Plan any profits which they made through the use of Plan assets, and are subject to any such other equitable or remedial relief as this Court deems appropriate, all in accordance with ERISA, Sections 409(a) and 502(a)(2) and (3), 29 U.S.C. §§ 1109(a) and 1132(a)(2) and (3), as well as pursuant to the Plan document and Trust Agreement.

* * *

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that the Court enter judgment for him and the class members he represents, granting the following relief:

* * *

a. An order requiring restitution by defendants to the Plan of the value of their use of surplus Plan assets to the extent of the value of their use of such assets, and irrevocably



transferring said amount to the Plan (*i.e.*, prohibiting its reversion to the Plan Sponsor) for the exclusive benefit of the Plan's participants and beneficiaries.

b. An order requiring defendants, and each of them, to personally restore to the Plan all profits made by them through the use of Plan assets.

* * *

8. An award of monetary damages to restore Spink and all affected class members to the position which they would have held but for the defendants' contractual and statutory violations as alleged herein.

* * *

10. An award of attorneys' fees, litigation expenses, prejudgment interest, and any other appropriate relief.

* * *

## STATUTORY PROVISIONS

## ERISA TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS
## SUBTITLE A—GENERAL PROVISIONS

**1. ERISA § 3, 29 U.S.C. § 1002, provides in part as follows:**

**§ 3. Definitions**

For purposes of this title:

* * *

(14) The term "party in interest" means, as to an employee benefit plan—

(A) any fiduciary (including, but not limited to, any administrator, officer, trustee, or custodian), counsel, or employee of such employee benefit plan;

(B) a person providing services to such plan;

(C) an employer any of whose employees are covered by such plan;

(D) an employee organization any of whose members are covered by such plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation.[,]

(ii) the capital interest or the profits interest of a partnership, or



(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a relative (as defined in paragraph (15)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an employee, officer, director (or an individual having powers or responsibilities similar to those of officers or directors), or a 10 percent or more shareholder directly or indirectly, of a person described in subparagraph (B), (C), (D), (E), or (G), or of the employee benefit plan; or

(I) a 10 percent or more (directly or indirectly in capital or profits) partner or joint venturer of a person described in subparagraph (B), (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of the Treasury, may by regulation prescribe a percentage lower than 50 percent for subparagraph (E) and (G) and lower than 10 percent for subparagraph (H) or (I). The Secretary may prescribe regulations for determining the ownership (direct or indirect) of profits and beneficial interests, and the manner in which indirect stockholdings are taken into account. Any person who is a party in interest with respect to a plan to which a trust described in section 501(c)(22) of the Internal Revenue Code of 1986 [26 U.S.C. § 501(c)(22)] is permitted to make payments under section 4223 [29 U.S.C. § 1403] shall be treated as a party in interest with respect to such trust.

* * *

(21) (A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 405(c)(1)(B) [29 U.S.C. § 1105(c)(1)(B)].

(B) If any money or other property of an employee benefit plan is invested in securities issued by an investment company



registered under the Investment Company Act of 1940, such investment shall not by itself cause such investment company or such investment company's investment adviser or principal underwriter to be deemed to be a fiduciary or a party in interest as those terms are defined in this title, except insofar as such investment company or its investment adviser or principal underwriter acts in connection with an employee benefit plan covering employees of the investment company, the investment adviser, or its principal underwriter. Nothing contained in this subparagraph shall limit the duties imposed on such investment company, investment adviser, or principal underwriter by any other law.

* * *

**ERISA TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS**
**SUBTITLE B—REGULATORY PROVISIONS**
**PART 4—FIDUCIARY RESPONSIBILITY**

**2. ERISA § 404(a), 29 U.S.C. § 1104(a), provides as follows:**

**§404. Fiduciary duties.**

**(a) Prudent man standard of care.**

(1) Subject to sections 403(c) and (d) [29 U.S.C. § 1103(c) and (d)], 4042 [29 U.S.C. § 1342], and 4044 [29 U.S.C. § 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents, and instruments are consistent with the provisions of this title and title IV.

(2) In the case of an eligible individual account plan (as defined in section 407(d)(3) [29 U.S.C. § 1107(d)(3)]), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer securities (as defined in section 407(d)(4) and (5) [29 U.S.C. § 1107(d)(4) and (5)]).



**3. ERISA § 405, 29 U.S.C. § 1105, provides as follows:**

**§ 405. Liability for breach by co-fiduciary**

**(a) Circumstances giving to liability.**

In addition to any liability which he may have under any other provision of this part, a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances:

(1) if he participates knowingly in, or knowingly undertakes to conceal, an act or omission of such other fiduciary, knowing such act or omission is a breach;

(2) if, by his failure to comply with section 404(a)(1) [29 U.S.C. § 1104(a)(1)] in the administration of his specific responsibilities which give rise to his status as a fiduciary, he has enabled such other fiduciary to commit a breach; or

(3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.

**(b) Assets held by two or more trustees.**

(1) Except as otherwise provided in subsection (d) and in section 403(a)(1) and (2) [29 U.S.C. § 1103(a)(1) and (2)], if the assets of a plan are held by two or more trustees --

(A) each shall use reasonable care to prevent a co-trustee from committing a breach; and

(B) they shall jointly manage and control the assets of the plan, except that nothing in this subparagraph (B) shall preclude any agreement, authorized by the trust instrument, allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this subparagraph (B) either individually or as a trustee for any loss resulting to the plan arising from the acts or omissions on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated.

(2) Nothing in this subsection shall limit any liability that a fiduciary may have under subsection (a) or any other provision of this part.

(3)(A) In the case of a plan the assets of which are held in more than one trust, a trustee shall not be liable under paragraph (1) except with respect to an act or omission of a trustee of a trust of which he is trustee.

(B) No trustee shall be liable under this subsection for following instructions referred to in section 403(a)(1) [29 U.S.C. § 1103(a)(1)].

**(c) Allocation of fiduciary responsibility; designated persons to carry out fiduciary responsibilities.**



(1) The instrument under which a plan is maintained may expressly provide for procedures (A) for allocating fiduciary responsibilities (other than trustee responsibilities) among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities (other than trustee responsibilities) under the plan.

(2) If a plan expressly provides for a procedure described in paragraph (1), and pursuant to such procedure any fiduciary responsibility of a named fiduciary is allocated to any person, or a person is designated to carry out any such responsibility, then such named fiduciary shall not be liable for an act or omission of such person in carrying out such responsibility except to the extent that --

(A) the named fiduciary violated section 404(a)(1) [29 U.S.C. §1104(a)(1)]--

(i) with respect to such allocation or designation,

(ii) with respect to the establishment or implementation of the procedure under paragraph (1), or

(iii) in continuing the allocation or designation; or

(B) the named fiduciary would otherwise be liable in accordance with subsection (a).

(3) For purposes of this subsection, the term "trustee responsibility" means any responsibility provided in the plan's trust instrument (if any) to manage or control the assets of the plan, other than a power under the trust instrument of a named fiduciary to appoint an investment manager in accordance with section 402(c)(3) [29 U.S.C. § 1102(c)(3)].

**(d) Investment managers.**

(1) If an investment manager or managers have been appointed under section 402(c)(3) [29 U.S.C. § 1102(c)(3)], then, notwithstanding subsections (a)(2) and (3) and subsection (b), no trustee shall be liable for the acts or omissions of such investment manager or managers, or be under an obligation to invest or otherwise manage any asset of the plan which is subject to the management of such investment manager.

(2) Nothing in this subsection shall relieve any trustee of any liability under this part for any act of such trustee.

**4. ERISA § 406, 29 U.S.C. § 1106, provides as follows:**

**§ 406. Prohibited transactions**

**(a) Transactions between plan and party in interest**

Except as provided in section 408 [29 U.S.C. § 1108]:



(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107(a)].

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 407(a) [29 U.S.C. § 1107(a)].

**(b) Transactions between plan and fiduciary.**

A fiduciary with respect to a plan shall not--

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

**(c) Transfer of real or personal property to plan by party in interest.**

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

**5. ERISA § 408, 29 U.S.C. § 1108, provides in part as follows:**

**§ 408. Exemptions from prohibited transactions**

**(a) Grant of exemptions**

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a) [29 U.S.C. §§ 1106, 1107(a)]. Action under this subsection may be taken only after consultation and



coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this Act. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interests of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 406(a) or 407(a) [29 U.S.C. §§ 1106(a), 1107(a)], the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 406(b) [29 U.S.C. § 1106(b)] unless he affords an opportunity for a hearing and makes a determination on the record with respect to the findings required by paragraphs (1), (2), and (3) of this subsection.

**(b) Enumeration of transactions exempted from 29 U.S.C. § 1106 prohibitions.**

The prohibitions provided in section 406 [29 U.S.C. § 1106] shall not apply to any of the following transactions:

(1) Any loans made by the plan to parties in interest who are participants or beneficiaries of the plan if such loans (A) are available to all such participants and beneficiaries on a reasonably equivalent basis,

(B) are not made available to highly compensated employees (within the meaning of section 414(q) of the Internal Revenue Code of 1986) [26 U.S.C. § 414(q)] in an amount greater than the amount made available to other employees, (C) are made in accordance with specific provisions regarding such loans set forth in the plan, (D) bear a reasonable rate of interest, and (E) are adequately secured. A loan made by a plan shall not fail to meet the requirements of the preceding sentence by reason of a loan repayment suspension described under section 414(u)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 414(u)(4)].

(2) Contracting or making reasonable arrangements with a party in interest for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor.

(3) A loan to an employee stock ownership plan (as defined in section 407(d)(6) [29 U.S.C. § 1107(d)(6)], if --

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at an interest rate which is not in excess of a reasonable rate.

If the plan gives collateral to a party in interest for such loan, such collateral may consist only of



qualifying employer securities (as defined in section 407(d)(5) [29 U.S.C. § 1107(d)(5)].

(4) The investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if --

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliate thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment.

(5) Any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State, if the plan pays no more than adequate consideration, and if each such insurer or insurers is -

(A) the employer maintaining the plan, or

(B) a party in interest which is wholly owned (directly or indirectly) by the employer maintaining the plan, or by any person which is a party in interest with respect to the plan, but only if the total premiums and annuity considerations

written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are parties in interest (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or annuity considerations written by the employer maintaining the plan).

(6) The providing of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan, and if -

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the providing of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and adherence to such



guidelines would reasonably preclude such bank or similar financial institution from providing such ancillary service (i) in an excessive or unreasonable manner, and (ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans.

Such ancillary services shall not be provided at more than reasonable compensation.

(7) The exercise of a privilege to convert securities, to the extent provided in regulations of the Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion.

(8) Any transaction between a plan and (i) a common or collective trust fund or pooled investment fund maintained by a party in interest which is a bank or trust company supervised by a State or Federal agency or (ii) a pooled investment fund of an insurance company qualified to do business in a State, if -

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank,

trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan.

(9) The making by a fiduciary of a distribution of the assets of the plan in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of this Act (relating to allocation of assets) [29 U.S.C. § 1344].

(10) Any transaction required or permitted under part 1 of subtitle E of title IV [29 U.S.C. §§ 1381 *et seq.*].

(11) A merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty Corporation to meet the requirements of section 4231 [29 U.S.C. § 1411].

(12) The sale by a plan to a party in interest on or after December 18, 1987, of any stock, if -

(A) The requirements of paragraphs (1) and (2) of subsection (e) are met with respect to such stock,

(B) On the later of the date on which the stock was acquired by the plan, or January 1, 1975, such stock constituted a qualifying employer security (as defined in section 407(d)(5) [29 U.S.C. § 1107(d)(5)] as then in effect), and



(C) Such stock does not constitute a qualifying employer security (as defined in section 407(d)(5) [29 U.S.C. § 1107(d)(5)] as in effect at the time of the sale).

(13) Any transfer in a taxable year beginning before January 1, 2001, of excess pension assets from a defined benefit plan to a retiree health account in a qualified transfer permitted under section 420 of the Internal Revenue Code of 1986 [26 U.S.C. § 420] (as in effect on January 1, 1995).

**(c) Fiduciary benefits and compensation not prohibited by 29 U.S.C. § 1106.**

Nothing in section 406 [29 U.S.C. § 1106] shall be construed to prohibit any fiduciary from -

(1) Receiving any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(2) Receiving any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan; except that no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan, or from an employee organization whose members are participants in such plan shall receive compensation from such plan,

except for reimbursement of expenses properly and actually incurred; or

(3) Serving as a fiduciary in addition to being an officer, employee, agent, or other representative of a party in interest.

* * *

**6. ERISA § 409, 29 U.S.C. § 1109, provides as follows:**

**§ 409. Liability for breach of fiduciary duty.**

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act [29 U.S.C. § 1111].

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this title if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

**7. ERISA § 410, 29 U.S.C. § 1110, provides in part as follows:**

**§ 410. Exculpatory provisions; insurance**

(a) Except as provided in §§ 405(b)(1) and 405(d) [29 U.S.C. §§ 1105(b)(1), (d)], any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or



liability for any responsibility, obligation, or duty under this part shall be void as against public policy.

(b) Nothing in this subpart shall preclude—

(1) a plan from purchasing insurance for its fiduciaries or for itself to cover liability or losses occurring by reason of the act or omission of a fiduciary, if such insurance permits recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary;

(2) a fiduciary from purchasing insurance to cover liability under this part from and for his own account; or

(3) an employer or an employee organization from purchasing insurance to cover potential liability of one or more persons who serve in a fiduciary capacity with regard to an employee benefit plan.

* * *

**ERISA TITLE I—PROTECTION OF EMPLOYEE BENEFIT RIGHTS**
**SUBTITLE B—REGULATORY PROVISIONS**
**PART 5—ADMINISTRATION AND ENFORCEMENT**

**8. ERISA § 502, 29 U.S.C. § 1132, provides in part as follows:**

**§ 502. Civil enforcement**

**(a) Persons empowered to bring a civil action**

A civil action may be brought—

(1) by a participant or beneficiary--

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409 [29 U.S.C. § 1109];

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 105(c) [29 U.S.C. § 1025(c)];

(5) except as otherwise provided in subsection (b), by the Secretary (A) to enjoin any act or practice which violates any provision of this title, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this title;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) or under subsection (i) or (l);



(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 609(a)(2)(A) [29 U.S.C. § 1169(a)(2)(A)]);

(8) by the Secretary, or by an employer or other person referred to in section 101(f)(1), (A) to enjoin any act or practice which violates subsection (f) of section 101 [29 U.S.C. § 1021(f)], or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of this title or the terms of the plan, by the Secretary, by any individual who was a participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

**(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions.**

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of the Internal Revenue Code of 1986 [26 U.S.C. §§ 401(a), 403(a), or 405(a)] (or

with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) with respect to a violation of, or the enforcement of, parts 2 and 3 of this subtitle [29 U.S.C. §§ 105 *et seq.*, §§ 1081 *et seq.*] (relating to participation, vesting, and funding), only if--

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 515 [29 U.S.C. § 1145].

(3) The Secretary is not authorized to enforce under this part any requirement of part 7 [29 U.S.C. §§ 701 *et seq.*] against a health insurance issuer offering health insurance coverage in connection with a group health plan (as defined in section 733(a)(1)) [29 U.S.C. § 1191b]. Nothing in this paragraph shall affect the authority of the



Secretary to issue regulations to carry out such part.

**(c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.**

**(1) Administrator's refusal to supply requested information.** Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 [29 U.S.C. § 1166(a)(1), (4)] or section 101(e)(1) [29 U.S.C. § 1021(e)(1)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper. For purposes of this paragraph, each violation described in subparagraph (A) with respect to any single participant, and each violation described in subparagraph (B) with respect to any single participant or beneficiary, shall be treated as a separate violation.

(2) The Secretary may assess a civil penalty against any plan administrator of

up to $1,000 a day from the date of such plan administrator's failure or refusal to file the annual report required to be filed with the Secretary under section 101(b)(4) [sic (b)(1)] [29 U.S.C. § 1021(b)(4) [sic (b)(1)]]. For purposes of this paragraph, an annual report that has been rejected under section 104(a)(4) [29 U.S.C. § 1024(a)(4)] for failure to provide material information shall not be treated as having been filed with the Secretary.

(3) Any employer maintaining a plan who fails to meet the notice requirement of section 101(d) [29 U.S.C. § 1021(d)] with respect to any person may in the court's discretion be liable to such participant or beneficiary or to such person in the amount of up to $100 a day from the date of such failure, and the court may in its discretion order such other relief as it deems proper.

(4) The Secretary may assess a civil penalty of not more than $1,000 for each violation by any person of section 101(f)(1) [29 U.S.C. § 1021(f)(1)].

(5) The Secretary may assess a civil penalty against any person of up to $1,000 a day from the date of the person's failure or refusal to file the information required to be filed by such person with the Secretary under regulations prescribed pursuant to section 101(g) [29 U.S.C. § 1021(g)].

(6) If, within 30 days of a request by the Secretary to a plan administrator for documents under section 104(a)(6) [29 U.S.C. § 1024(a)(6)], the plan administrator fails to



furnish the material requested to the Secretary, the Secretary may assess a civil penalty against the plan administrator of up to $100 a day from the date of such failure (but in no event in excess of $1,000 per request). No penalty shall be imposed under this paragraph for any failure resulting from matters reasonably beyond the control of the plan administrator.

(7) The Secretary and the Secretary of Health and Human Services shall maintain such ongoing consultation as may be necessary and appropriate to coordinate enforcement under this subsection with enforcement under section 1144(c)(8) of the Social Security Act.

* * *

**(h) Service Upon Secretary of Labor and Secretary of the Treasury.**

A copy of the complaint in any action under this title by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle [29 U.S.C. §§ 1101 *et. seq.*]. If the Secretary brings an action under subsection (a) on behalf of a participant or beneficiary, he shall notify the Secretary of the Treasury.

**(i) Administrative assessment of civil penalty.**

In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of the Internal Revenue Code of 1986 [26 U.S.C. § 4975(f)(4)] for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of such Code [26 U.S.C. § 4975(f)(5)]) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code [26 U.S.C. § 4975(e)(1)].

* * *

**(l) Civil penalties on violations by fiduciaries.**

(1) In the case of--

(A) any breach of fiduciary responsibility under (or other violation of) part 4 [29 U.S.C. §§ 1101 *et seq.*] by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,



the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1) --

(A) pursuant to any settlement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that --

(A) the fiduciary or other person acted reasonably and in good faith, or

(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9)) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986 [26 U.S.C. § 4975].

(m) In the case of a distribution to a pension plan participant or beneficiary in violation of section 206(e) [29 U.S.C. § 1056(e)] by a plan fiduciary, the Secretary shall assess a penalty against such fiduciary in an amount equal to the value of the distribution. Such penalty shall not exceed $10,000 for each distribution.

**TITLE 26. INTERNAL REVENUE CODE**
**SUBTITLE D—MISCELLANEOUS EXCISE TAXES**
**CHAPTER 43—QUALIFIED PENSION, ETC., PLANS**

**9. Section 4975 of Title 26, United States Code, provides in part as follows:**

**§ 4975. Tax on prohibited transactions**

**(a) Initial taxes on disqualified person**

There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).



**(b) Additional taxes on disqualified person**

In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

**(c) Prohibited transaction**

**(1) General rule**

For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

**(2) Special exemption.** – The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is --

(A) administratively feasible,

(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption



and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1108(a)].

* * *

**(e) Definitions.–**

**(1) Plan**–For purposes of this section, the term "plan" means--

(A) a trust described in section 401(a) [26 U.S.C. § 401(a)] which forms a part of a plan, or a plan described in section 403(a) [26 U.S.C. § 403(a)], which trust or plan is exempt from tax under section 501(a) [26 U.S.C. § 501(a)],

(B) an individual retirement account described in section 408(a) [26 U.S.C. § 408(a)],

(C) an individual retirement annuity described in section 408(b) [26 U.S.C. § 408(b)],

(D) a medical savings account described in section 220(d) [26 U.S.C. § 220(d)],

(E) an education individual retirement account described in section 530 [26 U.S.C. § 530], or

(F) a trust, plan, account, or annuity, which, at any time has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.

**(2) — Disqualified person**

For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,



(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of

officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

**(3) Fiduciary.**--For purposes of this section, the term "fiduciary" means any person who--

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary



responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1105(c)(1)(B)].

* * *

**(f) Other definitions and special rules**

For purposes of this section—

**(1) Joint and several liability.–** If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.

**(2) Taxable period.–** The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of--

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a), is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

**(3) Sale or exchange; encumbered property.–** A transfer of real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

**(4) Amount involved.–** The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value--

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

**(5) Correction.–** The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position



not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

* * *

**(h) Notification of Secretary of Labor. –** Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

**(i) Cross references.–**

For provisions concerning coordination procedures between Secretary of Labor and Secretary of Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974 [29 U.S.C. § 1203].

## ERISA TITLE III—JURISDICTION, ADMINISTRATION, ENFORCEMENT; JOINT PENSION TASK FORCE, ETC.
## SUBTITLE A—JURISDICTION, ADMINISTRATION, AND ENFORCEMENT

**10. ERISA § 3003, 29 U.S.C. § 1203, provides as follows:**

**§ 3003. Procedures in connection with prohibited transactions**

**(a) Notification to Secretary of Labor; opportunity to comment on imposition of tax under Code Sec. 4975; waiver; requests for investigations.**

Unless the Secretary of the Treasury finds that the collection of a tax is in jeopardy, in carrying out the provisions of section 4975 of the Internal Revenue Code of 1986 [26 U.S.C. § 4975] (relating to tax on prohibited transactions) the Secretary of the Treasury shall, in accordance with the provisions of subsection (h) of such section, notify the Secretary of Labor before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b) of such section, and, in accordance with the provisions of subsection (h) of such section, afford the Secretary an opportunity to comment on the imposition of the tax in any case. The Secretary of the Treasury shall have authority to waive the imposition of the tax imposed under section 4975(b) [26 U.S.C. § 4975(b)] in appropriate cases. Upon receiving a written request from the Secretary of Labor or from the Pension Benefit Guaranty Corporation, the Secretary of the Treasury shall cause an investigation to be carried out with respect to whether the tax imposed by section 4975 of such Code [26 U.S.C. § 4975] should be applied to any person referred to in the request.

**(b) Consultation.**

The Secretary of the Treasury and the Secretary of Labor shall consult with each other from time to time with respect to the provisions of section 4975 of the Internal Revenue Code of 1986 [26 U.S.C. § 4975] (relating to tax on prohibited transactions) and with respect to the provisions of title I of this Act relating to prohibited transactions and exemptions therefrom in order to coordinate the rules applicable under such standards.

**(c) Transmission of Information to Secretary of the Treasury.**



Whenever the Secretary of Labor obtains information indicating that a party-in-interest or disqualified person is violating section 406 of this Act [29 U.S.C. § 1106], he shall transmit such information to the Secretary of the Treasury.

## LEGISLATIVE HISTORY

**1. S. 1179, 93d Cong., 1st Sess. § 501(c)(3), (d)(17) (1973) [Not Enacted]**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 1, at 780, 945, 949, 950, 955-56 (1976)

### TITLE V – FIDUCIARY STANDARDS

### Part A – FIDUCIARY STANDARDS FOR PLAN OFFICERS AND EMPLOYEES

*SEC. 501 QUALIFICATIONS AND RESPONSIBILITIES OF INDIVIDUALS*

* * *

*(c) FIDUCIARY RESPONSIBILITIES.—With respect to any fund established under an employee benefit plan to which this section applies, any person serving as a fiduciary—*

* * *

*(3) shall not participate in any transaction which is or would be a prohibited transaction under section 4973 of the Internal Revenue Code of 1954 if such section applied to the fund.*

*(d) CIVIL ACTIONS.—*

* * *

*(17) Any party in interest who participates in a transaction described in subsection (c)(3) knowingly, or with reason to know that the transaction was a transaction to which that*



*subsection applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction. For purposes of this paragraph, the term "party in interest" means a person described in section 4973(e)(1) of the Internal Revenue Code of 1954.*

**2. H.R. 2, 93d Cong., 2d Sess. §§ 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) [Not Enacted]**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3772, 3780, 3816-17 (1976)

*FIDUCIARY STANDARDS*

*SEC. 15.*

* * *

*(i) Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.*

* * *

*SEC. 693. ACTIONS TO REDRESS OR RESTRAIN VIOLATIONS OF FIDUCIARY DUTY.*

*Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any*

*responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary who has failed to carry out his duties and the removal of any person who is serving in violation of the requirements of section 15(h) of the Welfare and Pension Plans Disclosure Act or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements of the Welfare and Pension Plans Disclosure Act or in violation of the document or documents governing the establishment or operation of the fund, may be brought by any participant or beneficiary of any employee benefit plan or fund subject to the Welfare and Pension Plans Disclosure Act in any court of competent jurisdiction, State or Federal, or the United States District Court for the District of Columbia, without respect to the amount in controversy and without regard to the citizenship of the parties. Where such action is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found. Such actions may also be brought by a participant or beneficiary as a representative party on behalf of all participants or beneficiaries similarly situated. In all civil actions authorized by this Act or the Welfare and Pension Plans Disclosure Act, attorneys appointed by the Secretary shall represent the Secretary except as provided in section 518(a) of title 28, United States Code (relating to litigation before the Supreme Court of the United States).*



**3. H.R. 2, 93d Cong., 2d Sess. §§ 111(b), (d), (e), 503(e) (as passed by the House on Feb. 28, 1974) [Not Enacted]**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3897, 3947, 3950-51, 3953-55, 4044, 4047 (1976).*

**FIDUCIARY RESPONSIBILITY**

SEC. 111.

* * *

(b)(1) A fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) For the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the

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*[ Note: On March 6, 1994, the Senate ordered that there be printed additional copies of H.R. 2 as it passed the House of Representatives on February 28, 1974. It is this version of H.R. 2 that was reprinted in the *Legislative History of the Employee Retirement Income Security Act of 1974*. *See id.* at 3898. Thus, the printed version of H.R. 2 as passed by the House bears the caption: "IN THE SENATE OF THE UNITED STATES, March 6, 1974, ordered printed as passed by the House, by unanimous consent." *Id.* For a summary of the sequence in which these bills were introduced and/or considered, see 120 Cong. Rec. 8851 (1974).]

conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments so as to minimize the risk of large losses unless under the circumstances it is prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as is consistent with this title.

(2) Except as permitted under subsection (a)(2) of this section, a fiduciary with respect to a plan shall not—

(A) deal with the assets of the plan for his own account,

(B) in his individual or any other capacity act in any transaction involving the plan on behalf of a party whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries,

(C) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan,

(D) permit the transfer of any property of the plan to or its use by any person known to be a party in interest, except in return for no less than adequate consideration, or

(E) permit the acquisition of any property or services from any person known to be a party in interest, except in exchange for no more than adequate consideration.



* * *

(d) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the fund resulting from each breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the fund by the fiduciary and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 113 of this Act.

(e) All assets of any employee benefit plan (other than any contract for the payment of annuities which is guaranteed by an insurance company and not issued to a trustee of the plan) shall be held in trust by one or more trustees. Such trustee or trustees shall either be named in the trust instrument or appointed by the administrator or administrators, and, upon acceptance of their appointment, shall have exclusive authority and discretion to manage, and exclusive control of, the assets of the plan (subject to proper directions of the administrator which are made under the terms of the plan and which are not contrary to this title and except to the extent that authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers). If the assets of a plan are held by two or more trustees—

(1) each shall use reasonable care to prevent a co-trustee from committing a breach, notwithstanding language to the contrary in the trust agreement; and

(2) they shall jointly manage and control the assets of the trust, except that nothing in this paragraph (2) shall preclude any agreement authorized by the trust instrument allocating specific responsibilities, obligations, or duties among trustees, in which event a trustee to whom certain responsibilities, obligations, or duties have not been allocated shall not be liable by reason of this paragraph (2) either individually or as a trustee for any loss resulting to the fund arising from the acts or omissions to act on the part of another trustee to whom such responsibilities, obligations, or duties have been allocated, unless the trustee to whom the responsibilities, obligations, or duties were not allocated participated knowingly in the activities constituting a breach of the specific responsibilities, obligations, or duties allocated to any other trustee.

* * *

**ENFORCEMENT**

SEC. 503.

* * *

(e) Civil actions under this title may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (b) of this section, or

(B) to recover benefits due him under the terms of his plan or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 111(d); or



(3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.

**4. Summary of Differences Between the Senate Version and the House Version of H.R. 2-To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93d Cong., 2d Sess. (1974)**

*Reprinted in* Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 5249, 5259 (1976)

*9. Civil Liability*

*House bill.*—

(1) Fiduciaries who breach any of their obligations under the bill are to be personally liable to the plan for losses resulting from the breach and for profits made through the use of plan assets, and are to be subject to other appropriate equitable relief, including removal.

(2) Fiduciaries are not to be liable for any breach committed before they became fiduciaries or after they cease to be fiduciaries.

*Senate amendment.*—This provision is included only in the Labor Act amendment.

(1), (2) Substantially the same as the House bill.

(3) Additionally, parties-in-interest who knowingly participate in a prohibited transaction, or had reason to know it was a prohibited transaction, are to be personally liable for losses sustained by the plan or for profits they realized from the transaction.

*Staff comment.*—

(1), (2) Substantially the same in both bills.

(3) The conferees may wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest.[1]

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[1] Not all the staff agree with this suggestion.



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

| | | |
|---|---|---|
| HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION and JOHN A. EDWARDSON, Plaintiffs, | ) | |
| vs. | ) | No. 92 C 5883 |
| SALOMON BROTHERS, INC. and SALOMON BROTHERS REALTY CORP., Defendants. | ) | |

**MEMORANDUM DECISION**

Joan H. Lefkow, Magistrate Judge:

Plaintiffs, Harris Trust and Savings Bank, as Trustee for Ameritech Pension Trust ("APT"), Ameritech Corporation ("Ameritech") and John A. Edwardson, seek recovery from Salomon Brothers, Inc. and Salomon Brothers Realty Corporation (collectively "Salomon") for alleged violations of various provisions of the Employee Retirement Income Security Act ("ERISA") and several state laws. Salomon has filed two counterclaims seeking contribution from Ameritech. Both sides have filed motions for summary judgment with respect to portions of the Second Amended Complaint ("complaint"): cross motions are pending with respect to count II which alleges liability based on Salomon's participation in transactions that are prohibited under ERISA, and Salomon further seeks summary judgment with respect to counts I and III of the complaint which allege other ERISA

violations.[1] Plaintiffs in turn seek summary judgment on Salomon's counterclaims.

## PROCEDURE ON SUMMARY JUDGMENT

Summary judgment obviates the need for a trial where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). To determine whether any genuine issue of fact exists, the court must pierce the pleadings and assess the proof as presented in depositions, answers to interrogatories, admissions and affidavits that are part of the record. Fed. R. Civ. P. 56, Notes of Advisory Committee on Rules. The party seeking summary judgment bears the initial burden of proving there is no genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 2553, (1986). It may meet this burden without coming forward with affirmative evidence to negate the nonmovant's claim if it can show the absence of evidence that would support an essential element of the nonmoving party's case. *Id.*, 106 S. Ct. at 2552-53. In response, the non-moving party cannot rest on bare pleadings alone but must use the evidentiary tools listed above to designate specific material facts showing that there is a genuine issue for trial. *Id.* at 324, 106 S. Ct. at 2553. A material fact must be outcome determinative under

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[1] The court previously dismissed counts IV through VII, XI and XII of the complaint. *See Harris Trust and Savings Bank v. Salomon Brothers, Inc.*, 832 F. Supp. 1169 (N.D. Ill. 1993)(Aspen, J.). As a result, only counts I through III (the ERISA claims) and counts VIII through X (the state law claims) remain at issue. Although Salomon has separately moved for summary judgment with respect to the state law claims, the parties have agreed to defer briefing that motion until after this decision with respect to the federal claims. Also pending are Salomon's motions to strike certain evidentiary items that plaintiffs have offered in support of their motion regarding count II and in opposition to Salomon's motion on the federal claims.



the governing law. *Pritchard v. Rainfair, Inc.*, 945 F.2d 185, 191 (7th Cir. 1991).

Although a bare contention that an issue of fact exists is insufficient to create a factual dispute, *Posey v. Skyline Corp.*, 702 F.2d 102, 105 (7th Cir. 1983), the non-moving party's evidence is to be believed and all reasonable inferences from the facts must be viewed in that party's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S. Ct. 2505, 2513 (1986); *Korf v. Ball State University*, 726 F.2d 1222, 1226 (7th Cir. 1984). Because plaintiffs and defendants have filed cross motions with respect to count II, the court must rule on each party's motion individually, determining in each case whether judgment may be entered in accordance with the standard set forth in Rule 56. *Wausau Ins. Co. v. Valspar*, 594 F. Supp. 269, 270 (N.D. Ill. 1984).

## FACTUAL BACKGROUND[2]

Ameritech sponsors and administers two pension plans, which qualify as employee pension benefit plans under ERISA. The plans are funded through APT, for which Harris is a directed trustee. Edwardson was a member of Ameritech's Asset Management Committee, the committee which Ameritech has authorized to act for the company in managing and administering APT. Each plaintiff is a fiduciary of APT within the meaning of ERISA.

During the relevant time period, Ameritech, through its Asset Management Committee, appointed National Invest-

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[2] Additional factual detail surrounding the transactions at issue can be found in Judge Aspen's two prior opinions in this matter. *See* 832 F. Supp. 1169 (N.D. Ill. 1993) and 813 F. Supp. 1340 (N.D. Ill. 1992). The court has assumed the reader's familiarity with those decisions. Moreover, because of the variety of legal issues involved, a significant number of facts are addressed as needed in the following sections.

ment Services of America, Inc. ("NISA") to serve as the investment manager for APT's dedicated bond fund ("DBF") and, as a result, delegated investment decisions concerning the assets within that portfolio to NISA.

Salomon Brothers, Inc. is a Delaware corporation engaged in the business of investment banking and underwriting securities. At the time at issue herein Salomon Brothers, Inc. had expertise and experience related to the hotel industry. Salomon Brothers Realty Corp. is a New York corporation which is affiliated with Salomon Brothers, Inc. Both corporations are owned by Salomon Brothers Holding Company, Inc. During the 1980's and thereafter, Salomon served as a broker-dealer on numerous debt and equity transactions for the plans whose assets APT holds.

On three separate occasions in 1987, 1988 and 1989, Motels of America, Inc. ("MOA") acquired various motel properties pursuant to financing set up by Salomon. Essentially, MOA issued mortgage notes secured by the motel properties and Salomon acting as principal, purchased all the notes for later resale to various institutional investors. At the closing of each of these transactions, MOA paid Salomon for its services. A portion of the fee was in cash and MOA also entered into a written fee agreement which gave Salomon certain rights to participate in the net cash flow, sale or refinancing proceeds, and property appreciation associated with the motel properties that MOA had acquired ("Fee Agreements I-III"). In October 1989, Best Inns, Inc. acquired nine hotel properties pursuant to a similar financing plan arranged by Salomon. At the closing of the transaction, Best Inns and Salomon also entered into a fee agreement ("Fee Agreement IV").

In 1987, Salomon offered to sell APT its interest in Fee Agreement I. Negotiations ensued in which Salomon provided a confidential offering memorandum and advocated the fee agreement as an appropriate and advantageous investment for APT. At some point, either Ameritech or NISA, acting in its capacity as investment manager, requested that Salomon retain a partial interest in the Fee Agreement. This request was made because NISA lacked the ability to evaluate MOA on a continuing basis and it wanted to take advantage of Salomon's claimed expertise in this area. In effect, there was a desire to keep Salomon's interests aligned with APT's to ensure that Salomon would continue to receive and evaluate information relating to the soundness of the Fee Agreement as an investment and to encourage Salomon to provide continuing advice regarding the investment to APT. Plaintiffs have submitted evidence that, as part of the transaction, Salomon in fact orally agreed to monitor MOA's and Best Inn's financial performance for APT/NISA and to provide information regarding that performance on an on-going basis.[3] On October 28, 1987, APT purchased 95% of Salomon's interest in Fee Agreement I. In 1988, after Salomon received Fee Agreement II, Salomon approached APT/NISA to purchase an interest in it. APT purchased 100% of Fee Agreement II.

In fall of 1989 Salomon again approached APT about purchasing an interest in Fee Agreement III. Salomon failed, however, to pass on certain adverse information concerning the performance of the underlying MOA properties, as well as adverse developments affecting the value of Fee Agreements I and II. On December 22, 1989, APT purchased 95% of Salomon's interest in Fee Agreement III and, on that same day, purchased 95% of Salomon's interest in Fee Agreement IV relating to the Best Inns properties.

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[3] The parties dispute the existence of any alleged oral agreement to monitor the Fee Agreements. Even if it did engage in monitoring activities, Salomon further disputes whether it was acting in its own interests or on behalf of APT.

The purchase of each participation interest in the Fee Agreement was effected pursuant to a written Assignment. Each Assignment sets forth the percentage interest to be assigned and the amount to be paid in consideration for the assignment and transfer of that interest. It also sets forth certain representations and warranties of the assignor and assignee. One of the APT's representations was that APT had "conducted an independent investigation of [MOA or Best Inns]" and that APT "has not relied upon any representation or warranty . . . by [Salomon] . . ., except as expressly set forth in Section 3 of this Assignment." The Assignment further contains an integration clause providing

> This assignment constitutes the entire agreement between the parties with respect to the subject matter hereof and supersedes all other prior agreements and understandings, both written and oral, between the parties hereto with respect to the subject matter hereof. Without limiting the generality of the foregoing, the representations and warranties made by the Assignor and the Assignee in Sections 3 and 4 above, respectively, constitute the only representations and warranties by the parties hereto in connection with the subject matter hereof.

Plaintiffs further submit that during negotiations for and after the closing of the Fee Agreement transactions, Salomon made numerous falsely positive representations regarding MOA and Best Inns. Salomon also failed to disclose information regarding performance declines and other facts which would have alerted plaintiffs to the precarious condition of the investments. Thus, despite Salomon's representations to the contrary, the Fee Agreements were virtually worthless. Both MOA and Best Inns are bankrupt.

## ANALYSIS

ERISA is a comprehensive statute designed to protect employee benefit plans. In furtherance of its goals, the statute



designates certain parties as plan fiduciaries, 29 U.S.C. § 1002(21), and imposes personal liability on them for any injury to the plan resulting from a breach of their fiduciary duties. 29 U.S.C. § 1109(a). ERISA also designates other persons as "parties in interest" and specifically prohibits plan fiduciaries from engaging in certain transactions with parties in interest. *Id.* § 1106. Section 1132 then sets forth a variety of enforcement provisions describing the circumstances under which the Secretary of Labor, as well as plan participants, beneficiaries and fiduciaries, may initiate civil actions to redress violations of the act.

### Count I

In count I, plaintiffs allege that Salomon is a fiduciary of APT within the meaning of ERISA § 1002(21) and that Salomon's sale of the Fee Agreement participation interests to APT, as well as Salomon's failure to subsequently monitor the investment breached fiduciary duties that Salomon owed to APT. Salomon contends that plaintiffs have failed to offer any admissible evidence that Salomon was a fiduciary of APT and, further, that the undisputed evidence establishes that it was not such a fiduciary.

A person will be deemed to be a fiduciary with respect to an ERISA plan

> to the extent that (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so . . . .

29 U.S.C. § 1002(21)(A). In keeping with ERISA's remedial goals, the courts liberally construe the word "fiduciary" to be more rather than less inclusive. Whether a person qualifies

as a fiduciary must be judged according to objective standards. *Farm King Supply, Inc. Integrated Profit Sharing Plan and Trust v. Edward D. Jones & Co.*, 884 F.2d 288, 291-92 (7th Cir. 1989). If the requirements of the statute and the regulations promulgated thereunder are met, it makes no difference whether the parties involved subjectively believe that a fiduciary relationship exists. *Id.* Although plaintiffs claim that Salomon qualifies as a fiduciary under both statutory definitions, evidence that Salomon fits within either definition is sufficient to prevent entry of summary judgment against plaintiffs. As a result, the court will separately consider the two standards.

a. Discretionary Authority or Control

Plaintiffs contend that summary judgment is inappropriate because there is a question of fact whether Salomon had discretionary authority or control respecting the management of a portion of APT's assets. In support of this contention, plaintiffs point to evidence that before NISA decided to invest APT's assets in the Fee Agreements, NISA sought and obtained Salomon's oral agreement to continually monitor the investments' performance on behalf of APT/NISA and NISA required Salomon to retain a 5% interest in three of the four Fee Agreements. Plaintiffs' evidence indicates that NISA insisted on these conditions to insure that Salomon's interest would be aligned with APT's interest and, therefore, "Salomon would provide NISA/APT with whatever information or decisions it needed." *See* Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment at 14. In short, NISA believed it lacked the ability to evaluate the fee agreements on an ongoing basis and wanted to take advantage of Salomon's claimed expertise in the area. Salomon responds that any evidence relating to an alleged oral agreement to monitor is barred by the parol evidence rule, but even if such an agreement existed, it did not provide Salomon with the type of discretionary control over



APT's assets that creates a fiduciary relationship within the meaning of ERISA § 1002(21).

In *Farm King*, the Seventh Circuit pointed out that the cases finding a fiduciary relationship based on discretionary control over the management of an employee benefit plan or its assets had a common theme, namely, "the authority to exercise control unilaterally over a portion of a plan's assets, not merely to propose investments." *Farm King*, 884 F.2d at 292. There, the court concluded that a brokerage firm did not have the requisite discretion despite evidence that over the course of four years, the brokerage firm's representatives had had complete discretion in selecting and presenting securities to the plan, the firm had made recommendations regarding various investments and the plan's trustees had purchased securities almost exclusively from the brokerage firm. *Id.* The lesson of *Farm King* is that "discretionary control" requires something more than influential advice, it requires proof that an alleged fiduciary actually exercised some amount of decision-making power with respect to the plan's assets or had the authority to do so. *Pappas v. Buck Consultants, Inc.*, 923 F.2d 531, 535 (7th Cir. 1991). While proof that the plan has specifically delegated decision-making authority to the alleged fiduciary is not required, there must, at a minimum, be some indication that the alleged fiduciary's influence has so transcended normal bounds that it effectively has caused the plan's trustees to abdicate their independent decision-making powers to the alleged fiduciary. *See e.g., Schloegel v. Boswell*, 994 F.2d 266, 271 (5th Cir. 1993); *Reich v. McManus*, 883 F. Supp. 1144, 1149 (N.D. Ill. 1995)(summary judgment inappropriate where plan trustees had stated that all investment decisions were based exclusively on broker's advice and broker had notified at least one trustee that the trustees had to follow his advice or find a new consultant). In other words, there must be evidence that the alleged fiduciary is effectively acting for the plan. *Associates*

*in Adolescent Psychiatry v. Home Life Insurance Co.*, 941 F.2d 561, 570 (7th Cir. 1991).

Here, the evidence of Salomon's influence, taken in a light favorable to plaintiffs, fails to rise to the requisite level of control. Even assuming Salomon's alleged oral agreement to monitor the fee agreement is admissible,[4] nothing indicates that information from Salomon was or was intended to be the exclusive basis of NISA/APT's investment decisions. To the contrary, a review of plaintiff's evidence in this regard reveals that Salomon was to provide information not otherwise available to NISA but that NISA understood that there was a need for skepticism with respect to the information because as buyer and seller their interests were at odds. Indeed, those adverse interests are one of the reasons that NISA wanted Salomon to retain an equity interest in the investments — to increase the reliability of the information received by aligning Salomon's interests with that of APT. In a telling comment, Joseph Gorman, president of NISA, testified that "[i]n the last analysis, [NISA] had to independently assess whether [the Fee Agreements] ought to come into the portfolio. But in doing that we relied upon expertise that was other than our own; and that would be primarily Salomon, secondarily Ameritech." While it is clear that Salomon's advice was to be influential, it is also evident that neither APT or NISA had relinquished discretionary authority to Salomon.

Although, plaintiffs assert, Mr. Gorman also testified that Salomon was to "bring [NISA] whatever information or *decisions* we needed" (emphasis added), a review of the actual testimony reveals that Salomon was to follow the investment and report to NISA as required, thereby providing NISA/APT with useful information and apprising NISA/APT

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[4] Whether evidence of the oral agreement is admissible is addressed in the next section.



of decisions that NISA/APT needed to make.[5] As an example of the way in which the parties were to operate, Mr. Gorman stated, "if there was a choice to be made representing our part of the investment, that we be presented the choice and we would make the choice." Gorman Dep. at 350.

Despite plaintiffs' contention that Salomon's claimed expertise in the area of these real estate investments made Salomon's advice especially influential, influence over the trustees' investment decisions does not amount to effective control over plan assets. While persons who render advice to a plan may play influential roles by virtue of the expertise they possess or the capacities in which they act, to be a fiduciary such persons must exercise what amounts to actual decision-making power. *Reich v. Lancaster*, 55 F.3d 1034, 1049 (5th Cir. 1995); *Schloegel*, 994 F.2d at 271. Based on this record, it appears that Salomon's relationship to APT was more akin to the relationship at issue in *Farm King*,

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[5] More fully, Mr. Gorman stated,

> When we were clarifying roles and understandings about who would do what with respect to the MOA investment, [NISA] relied upon the fact that Salomon was [MOA's] investment banker, that [Salomon] had access to information that otherwise would not be available to us. And that as partners in the ownership of [the fee agreements], [Salomon] would follow it closely, appraise us of those things that affected our interest and bring to us whatever either information or decisions we needed to — most especially having to do with the closing, with the appraisal at the end where we would — where Ameritech would get out of their investment.

Gorman Dep. at 606-07. Even construing this testimony in a light favorable to plaintiffs, it is unreasonable to infer that Salomon was to be the decisionmaker.

where the broker periodically made presentations regarding the performance of prior investments and recommended courses of action with respect to both prior and future investments; the actual investment decisions, however, were left to the trustees. There is no evidence that Salomon, assuming it agreed to monitor the investments, did more. NISA remained free to reject any advice or information received from Salomon and there is no evidence that it ever purposefully or effectively surrendered that freedom. On this record, then, Salomon does not qualify as a plan fiduciary within the meaning of § 1002(21)(A)(i).

b. Rendering Investment Advice

Plaintiffs alternatively argue that Salomon is a fiduciary within the meaning of § 1002(21) because it was paid to provide investment advice regarding APT's money or property. *See* 29 U.S.C. § 1002(21)(A)(ii). To assist in deciding whether a person qualifies as an investment advisor fiduciary, the Department of Labor ("DOL") has promulgated regulations explaining that a person shall only be deemed to be rendering "investment advice" to an employee benefit plan if

> (i) such person renders advice to the plan as to the value of securities or other property, or makes recommendations as to the advisability of investing in, purchasing, or selling securities or other property; and
>
> (ii) such person either directly or indirectly . . .
>
> (A) has discretionary authority or control, whether pursuant to agreement, arrangement or understanding, with respect to purchasing or selling securities or other property for the plan; or
>
> (B) renders any advice . . . on a regular basis to the plan pursuant to a mutual agreement, arrangement or understanding, written or otherwise, between



> such person and the plan . . . that such services will serve as a primary basis for investment decisions . . . and that such person will render individualized investment advice to the plan based on the particular needs of the plan regarding such matters as, among other things, investment policies or strategy, overall portfolio composition, or diversification of plan investments.

29 C.F.R. § 2510.3-21(c)(1). The parties seem to agree that Salomon provided NISA/APT with information or recommendations that would satisfy subsection (i) of the DOL regulation. Their dispute centers on whether there is evidence satisfying the requirements of subsection (ii)(B).[6] Salomon contends that there is no admissible evidence of a mutual agreement or understanding that Salomon would provide advice that would serve as the primary basis for APT's investment decisions. Moreover, even if there was a mutual understanding, Salomon contends that it received no fee or compensation for any alleged investment advice. Plaintiffs, of course, disagree.

The starting point for the analysis is whether there is adequate evidence to establish the existence of a mutual understanding between Salomon and NISA/APT to the effect that Salomon's advice would serve as the primary basis for NISA/APT's investment decisions. *Farm King*, 884 F.2d at 293. Again, plaintiffs rely on testimony and other evidence

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[6] Plaintiffs also contend that Salomon qualifies as an investment advisor fiduciary under subsection (ii)(A), but as courts have recognized, subsection (ii)(A) of the DOL regulation is essentially an overlap of ERISA § 1002(21)(A)(i). *Olson v. E.F. Hutton & Co., Inc.*, 957 F.2d 622, 626 (8th Cir. 1992). As discussed above, there is no evidence that Salomon exercised discretionary control with respect APT's participation interests. Subsection (ii)(A) of the DOL regulations is not satisfied.

indicating that before the Assignments were executed, NISA sought and obtained Salomon's oral agreement to monitor the fee agreements and provide NISA/APT with the information necessary to make appropriate investment decisions. While insufficient to establish discretionary control over APT's assets, such pieces of evidence might raise a question of fact as to whether the requisite mutual understanding existed. Nevertheless, the court need not decide that issue because, as Salomon points out, the assignment of the participation interests was effected through an integrated written contract and, therefore, the parol evidence rule renders proof of the alleged oral agreement legally inadmissible.

Under New York law,[7] parol evidence is not admissible to vary or contradict the terms of a written agreement where the writing expresses the entire agreement of the parties, i.e., it is integrated. *Stroll v. Epstein*, 818 F. Supp. 640, 645 (S.D.N.Y. 1993). Here, each Assignment appears to be complete on its face and expressly provides that the written contract constitutes the entire agreement between the parties. *Id., citing, Happy Dack Trading Co., Ltd. v. Agro-Industries, Inc.*, 602 F. Supp. 986, 991 (S.D.N.Y. 1984) (a contract is integrated as a matter of law if it appears complete on its face). The Assignments are otherwise unambiguous and make no reference to a separate agreement to monitor. While

[7] Each Assignment transferring a percentage of Salomon's interests in the Fee Agreements provides that the Assignment will be governed by New York law. Because the parol evidence rule is substantive, not procedural, this court must look to the appropriate state law for guidance. As a federal court sitting in diversity, the court must apply the choice of law rules of the state in which it sits. Because Illinois will honor a contractual choice of law provision absent certain conditions not present here, the court must apply New York law in interpreting the Assignments. *Janice Doty Unlimited, Inc. v. Stoecker*, 697 F. Supp. 1016, 1019 (N.D. Ill. 1988).



acknowledging the general contours of the parol evidence rule, plaintiffs argue that ERISA § 1110(a)[8] overrides the rule or preempts its application under circumstances like those presented here. They reason that relying on the Assignments' integration clause to preclude evidence of Salomon's fiduciary status is tantamount to using that provision to relieve Salomon of its fiduciary responsibilities. This argument is not persuasive. Assuming admissible evidence established that Salomon was an ERISA fiduciary, the integration clause would not relieve Salomon of any responsibility or liability attendant with that status. The parties merely agreed to limit their respective roles to that which is set forth in the Assignments. Whatever liability or responsibility follows from those roles remains unlimited. The Seventh Circuit has recognized the importance of this distinction. In a case where a contract vested one party with sufficient discretionary authority to be deemed an ERISA fiduciary, the court stated that despite ERISA § 1110(a) parties may contractually decide how much authority to vest in a person (potentially precluding a finding of fiduciary status), but they may not decide how much liability attaches to the exercise of that authority if the authority so bestowed makes that person a fiduciary. *Chicago Bd. of Options Exchange, Inc. v. Connecticut General Life Ins. Co.*, 713 F.2d 254, 259 (7th Cir. 1983). In short, § 1110(a) is inapplicable.

Plaintiffs also argue that proof of the monitoring agreement is admissible because it was a condition precedent to the assignment of Salomon's interests in the Fee Agreements. New York law does permit the use of parol evidence to es-

[8] This section provides that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a).

tablish a condition precedent that precludes the legal effectiveness of the contract absent the occurrence of the condition, but only if the condition does not contradict the terms of the writing. *Hicks v. Bush*, 10 N.Y.2d 488, 180 N.E.2d 425, 427 (N.Y. 1962). Thus, despite plaintiffs' evidence that NISA would not have proceeded with the transaction absent the monitoring agreement, evidence of the alleged oral agreement is barred. It directly contradicts the terms of the Assignments which state that there are no other agreements between the parties other than those set forth therein. In other words, the language of the Assignment indicates that, unless otherwise set forth therein, the purchase and sale was unconditional. In a similar situation, an alleged oral condition to the effectiveness of a guaranty was found to be not proveable as a matter of law. *See Bank Leumi Trust Co. of New York v. Wulkan*, 735 F. Supp. 72, 77-78 (S.D.N.Y. 1990)(alleged oral agreement that effectiveness of guaranty was conditioned upon guarantor obtaining permission from proper governmental authorities). Plaintiffs' position may be better characterized as an intent to purchase Salomon's alleged agreement to monitor in addition to the participation interests. While NISA may not have intended to proceed with the transaction without this additional consideration, the alleged oral agreement is not a condition precedent in the sense that nonoccurrence of the condition precludes enforcement of the contract. The purchase and sale of the participation interests took place in accordance with the written Assignments; parol evidence cannot now be permitted to vary the terms of the sale.

Plaintiffs next argue that proof of Salomon's representations that it would monitor the fee agreement investments is admissible because a general merger clause is ineffective to exclude parol evidence to show fraud in the inducement of a contract. Although plaintiffs are correct that New York law does permit the introduction of parol evidence to prove allegations of fraud, the introduction of the alleged agreement to



monitor for this purpose would not materially advance plaintiffs' claim that Salomon is an investment advisor fiduciary. Proof that Salomon induced NISA to invest in worthless instruments by making fraudulent promises to monitor does not establish the mutual agreement that is essential to proving Salomon's status as an investment advisor fiduciary. To the contrary, it would suggest that there was no mutual agreement. While such evidence would be relevant to a claim that Solomon committed fraud, it is insufficient to establish the requisite contractual meeting of the minds. Plaintiffs have failed to offer admissible evidence of a mutual understanding between NISA and Salomon that Salomon would regularly provide investment advice which would serve as the primary basis of NISA/APT's investment decisions. In light of this conclusion, it is not necessary to consider whether Salomon received a fee or other compensation for any alleged investment advice.

In sum, plaintiffs have not offered sufficient evidence to create a genuine issue as to whether Salomon qualifies as an ERISA fiduciary. Salomon is entitled to summary judgment with respect to Count I of the Second Amended Complaint.

**Count II**

In this count, plaintiffs contend that regardless of whether Salomon qualifies as a fiduciary, they are entitled to restitution from Salomon because Salomon is a "party in interest" within the meaning of ERISA and, as a result, ERISA § 1106(a)[9] prohibits Salomon's participation in the Fee

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[9] The pertinent portions of § 1106(a) provide that

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —

(...continued)

Agreement transactions. 29 U.S.C. §§ 1106(a)(1)(A) and (D). They seek recovery pursuant to ERISA § 1132(a)(3).[10] Salomon responds that the court should enter summary judgment in its favor, not plaintiffs, because ERISA does not authorize any private cause of action against nonfiduciaries, even parties in interest who have engaged in § 1106(a) prohibited transactions. Assuming, for purposes of argument, that statutory authority exists, Salomon further contends that Seventh Circuit precedent precludes all private avenues of recovery against nonfiduciaries for participation in prohibited transactions. Salomon finally asserts that plaintiffs have failed to satisfy their evidentiary burden with respect to essential elements of their claim.

a. Availability of a Private Remedy

Determining whether count II alleges a valid cause of action centers on two closely related but distinct issues:

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> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
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> * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1)(A) & (D).

[10] This section provides that fiduciaries of a plan, like plaintiffs, may bring suit

> (A) to enjoin any act or practice which violates any provision of this subchapter [relating to the protection of employee benefit rights] or the terms of the plan, or
>
> (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provision of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3)(A) & (B).



whether it is a violation of ERISA for a nonfiduciary party in interest to engage in a § 1106(a) prohibited transaction and, if yes, whether ERISA affirmatively authorizes plaintiffs to bring suit to redress such a violation. Although the line between these issues is sometimes obscure, separate treatment provides a more reasoned understanding of ERISA's language and legislative history, as well as the relevant case law.

Turning to the first issue, Salomon relies on *Mertens v. Hewitt Associates*, 508 U.S. 248, 113 S. Ct. 2063 (1993), to assert that § 1106(a) does not explicitly impose any duty on *nonfiduciary* parties in interest to avoid participation in the indicated "prohibited" transactions, and, therefore, it has committed no wrong that is remediable under ERISA. In *Mertens*, the Supreme Court considered whether ERISA authorizes a cause of action against a nonfiduciary for knowing participation in the breach of another's fiduciary duties. The Court recognized that § 1132(a)(3), the same enforcement provision that is at issue here, does not authorize suit to obtain equitable relief "at large" but only for the purpose of "redress[ing any] violations or . . . enforc[ing] any provisions" of ERISA or an ERISA plan. *Id.* at 253, 113 S. Ct. at 2067. Because no ERISA provision explicitly requires nonfiduciaries to avoid participation in an ERISA fiduciary's breach of its duties, the Court made clear its view, although in dicta, that such participation cannot be said to violate ERISA and, therefore § 1132(a)(3) would not authorize suit.[11] *Id.* Salomon would have the court apply identical rea-

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[11] The Court's discussion of this issue is dicta because the parties in *Mertens* assumed that the defendant's conduct violated ERISA. Therefore, the arguments before the Court and the Court's holding were limited to what forms of relief are available under § 1132(a)(3). *Mertens*, 508 U.S. at 254-55, 113 S. Ct. at 2067. Nevertheless, the Seventh Circuit has found the *Mertens* dicta to be controlling within this circuit. *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994)("the Supreme Court has made

(...continued)

soning to find that Salomon had no duty to avoid participation in the Fee Agreements. The Court in *Mertens*, however, specifically contrasted the absence of any provision giving rise to a nonfiduciary's duty to avoid "knowing participation," with other provisions which, it recognized, can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in § 1106(a) transactions. *Mertens*, 508 U.S. at 254 & n.4, 113 S. Ct. at 2067 & n.4 ("ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries . . . ." "For example, a 'party in interest' . . . may not offer his services or engage in certain other transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2)."). Salomon's attempt to counteract the importance of the Supreme Court's distinction between the lack of duty in the case before it and the presence of a duty regarding § 1106(a) is without force. Indeed, Salomon seems to accept *Mertens*' belief that § 1106(a) can be read as imposing obligations on nonfiduciary parties in interest, but argues that the existence of a duty is not enough to authorize a civil action against it. *See e.g.*, Salomon's Memorandum Addressing Cases Supplementally submitted by Plaintiffs on the Parties' Cross Motions for Summary Judgment at 6. This argument is more applicable to the second half of the analysis and will be discussed below. Further, several appellate courts have acknowledged the significance of this distinction and have concluded that parties in interest are obligated to avoid the transactions prohibited in § 1106(a). *See e.g., Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

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clear its view that Congress's omission to impose on nonfiduciaries a duty not to participate knowingly in an ERISA fiduciary's breach of fiduciary obligations was not inadvertent").



In addition to the Supreme Court's acknowledgment, ERISA's legislative history reflects a congressional intent to obligate nonfiduciary parties in interest to abstain from participation in § 1106(a) transactions. A Joint Explanatory Statement of the Committee of Conference ("Conference Report"), reveals that, "[t]he conference substitute[12] prohibits plan fiduciaries *and parties in interest* from engaging in a number of specific transactions." H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. 4639, 5087 (emphasis added). The Conference Report further indicates that "blind" purchases or sales, *e.g.*, where neither party knows the identity of the other, will not ordinarily be prohibited transactions, because "there is no reason to impose a sanction on a fiduciary (*or party-in-interest*) merely because, by chance, the other party turns out to be a party-in-interest (or plan)." *Id.* (emphasis added). Thus, the legislative history recognizes, at least implicitly, that both parties may be subject to sanctions when the parties in a prohibited transaction are known to each other. Contrary to Salomon's contention, then, the legislative history reveals that Congress perceived certain transactions between a plan and a party in interest as problematic, and in enacting § 1106(a) it intended to impose a duty on both parties in interest and fiduciaries to avoid such transactions. *Accord, Comm'r. of Internal Revenue v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, 113 S. Ct. 2006, 2012 (1993)("Congress' goal [in § 1106(a)] was to bar

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[12] In enacting ERISA, the House of Representatives proposed a bill which the Senate rejected. The Senate then proposed its own legislation in the form of amendments to the House bill. Because of significant differences between the House and Senate proposals, the bills were sent to a committee of conference which agreed to a "conference substitute." The conference substitute was approved by both houses and enacted into law.

categorically a transaction that was likely to injure the pension plan.").[13]

Nevertheless, Salomon argues, the Seventh Circuit's adoption of the *Mertens* dicta in *Continental Casualty* is controlling within this circuit. In *Continental Casualty*, the Seventh Circuit determined that it was bound to follow *Mertens*' view that ERISA failed to impose any duty on nonfiduciaries to avoid knowing participation in an ERISA fiduciary's breach of its duties. 33 F.3d at 757. Although the Seventh Circuit found that dicta to be sufficiently weighty to control the outcome of the very issue that the dicta addressed, it did so only with some degree of discomfort. *Id.* at 757 (indicating that the Supreme Court's discussion was based on "a strict constructionist's approach that we might not embrace as an original matter"). In light of this obvious unease, it is not at all clear that the Seventh Circuit would find a similar lack of duty under the circumstances of this case, especially where *Mertens* itself, subsequent appellate court cases and ERISA's legislative history all indicate that different treatment is appropriate. Parties in interest, even if not fiduciaries of a plan, have a duty under § 1106(a) to avoid the transactions identified therein.

The question then becomes whether ERISA authorizes a private cause of action to recover against nonfiduciary parties in interest who violate § 1106(a). Salomon contends that ERISA not only fails to expressly create a private right of action but that the legislative history demonstrates that Congress rejected any such right. In contrast, the circuit courts that have addressed the issue have uniformly found

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[13] Indeed, if there were no duty to avoid such transactions, one might wonder whether there is any basis for imposing administrative penalties against parties in interest, a remedy which Salomon concedes is authorized. *See* 29 U.S.C. § 1132(i).



that ERISA's civil enforcement provision, 29 U.S.C. § 1132, provides the requisite authority. *See e.g., Stangl*, 73 F.3d at 1032; *Landwehr*, 72 F.3d at 734; *Compton*, 57 F.3d at 285-87; *Rowe*, 20 F.3d at 31. Despite factual differences between those cases and this one, their reasoning is persuasive.

The language of § 1132(a)(3) is plainly broad enough to constitute the needed "affirmative authorization." Under its terms, plaintiffs are entitled to bring an equitable action to redress any violation of ERISA or to enforce the terms of the statute. Because a party in interest's participation in a § 1106(a) prohibited transaction violates the statute, plaintiffs' suit can be said to be intended to redress the alleged violation and to enforce ERISA's ban on those transactions. That § 1132(a)(3) does not identify specific categories of potential defendants makes it clear that it was intended to authorize suit against any entity that violates ERISA. Thus, whether Salomon is a proper defendant does not turn on whether it is a fiduciary or nonfiduciary but on whether it violated ERISA, that is to say, whether it is in fact a party in interest who engaged in a prohibited transaction.

This conclusion is in accord with *Mertens* where the Court made clear its belief that § 1132(a)(5)[14] did not authorize suit because the nonfiduciary defendant had not violated ERISA, not because the section failed to expressly authorize suits against nonfiduciaries. Moreover, the Court strongly suggested that private suits could be used as an avenue of recovery against nonfiduciary parties in interest who engage in

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[14] Although the Court in *Mertens* was directly confronted with an action by the Secretary of Labor pursuant to § 1132(a)(5) (authorizing the Secretary of Labor to file suit on the same basis that a plan fiduciary, beneficiary or participant file suit under § 1132(a)(3)), the Court stated that the language of § 1132(a)(3) should be deemed to have the same meaning as § 1132(a)(5). *Mertens*, 508 U.S. at 260, 113 S. Ct. at 2070.

prohibited transactions. It stated, "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . ." Salomon counters that the Court must have been referring to the administrative "correction" of a prohibited transaction.[15] *See* 29 U.S.C. § 1132(i). Such an assumption, however, makes little sense in light of the mandatory nature of the Court's language. Although § 1132(i) authorizes the Secretary of Labor to levy a greater penalty against a party in interest if a prohibited transaction is not corrected, nothing in that section says that a party in interest must correct the transaction. Thus, despite the threat of a fine up to 100% of the amount at issue, a party in interest is nonetheless free to keep any ill-gotten plan assets.[16] The more reasonable interpretation of *Mertens* is that the Court

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[15] Section 1132(i) provides that

> In the case of a transaction prohibited by section 1106 . . . by a party in interest . . ., the Secretary [of Labor] may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved . . .; except that if the transaction is not corrected . . . such penalty may be in an amount not more than 100 percent of the amount involved.

29 U.S.C. § 1132(i). "Correction" is accomplished by undoing the prohibited transaction to the extent possible. *See* 29 C.F.R. § 2560.502i-1(c), *incorporating*, 26 C.F.R. § 53.4941(e)-1(c)(1).

[16] Under some circumstances, refusal to correct a prohibited transaction may be the more attractive option. Even where a party in interest corrects the transaction, the Secretary of Labor may still impose a civil penalty of up to 5% of the amount at issue. 29 U.S.C. § 1132(i).



was referring to an ability to use civil actions under § 1132(a) to force a party in interest to disgorge.[17]

Salomon insists, however, that Congress's specific imposition of administrative penalties and excise taxes on parties in interest is proof that all other remedies should be excluded. This argument is at odds with both the language of § 1132(a)(3) and ERISA's statutory purposes. ERISA is intended to provide protection for the interests of participants in employee benefit plans. 29 U.S.C. § 1001. Moreover, the Supreme Court has recently recognized that § 1132(a)(3) is a catch-all provision that operates as a safety net when the specific remedies set forth under ERISA are inadequate. *Varity Corp. v. Howe*, __ U.S. __, 116 S. Ct. 1065, 1077-78 (1996). To find that administrative penalties and excise taxes are the exclusive remedies against parties in interest who have engaged in prohibited transactions would provide little, if any, protection for the interests of the plan participants. For example, where the fiduciary who caused the plan to enter the transaction is judgment proof, there might be no means to recover the plan's lost assets. As the Ninth Circuit recognized in Landwehr, limiting the potential defendants to only one of two parties to the transaction, far from providing the full range of remedies available, would render the available

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[17] The Court's subsequent statement indicating that service providers "(assuming nonfiduciaries can be sued under [§ 1132](a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees," is best understood as specifically referring to suits against nonfiduciary service providers for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. *See Mertens*, 508 U.S. at 262, 113 S. Ct. at 2072. As already discussed, the Court believed that such participation was not an ERISA violation, but assuming it was, it makes clear that § 1132(a)(3) would authorize an action for injunctive relief, restitution or other equitable remedies.

relief wholly inadequate. *Landwehr*, 72 F.3d at 734, *citing, Nieto v. Ecker*, 845 F.2d 868, 874 (9th Cir. 1988).

Salomon argues, however, that ERISA's legislative history undeniably shows that Congress expressly rejected any private cause of action against nonfiduciary parties in interest, and therefore the general language of § 1132(a)(3) should not be used to bring in such an action "through the back door." The court does not agree. Each of the rejected provisions would have imposed personal liability on parties in interest, subjecting them to claims for legal relief, *e.g.*, damages. The rejection of those provisions, however, does not necessarily rule out the potential for a compromise somewhere between no civil liability and personal liability for all losses, *e.g.*, the availability of a suit limited to equitable relief. Indeed, the final language of § 1132(a), with its inclusion of catch-all provisions for equitable relief, appears to be just such a negotiated compromise.[18]

But, Salomon argues, the Conference Report also states that ERISA's "labor provisions," of which § 1132 is a part, apply rules and remedies similar to trust law governing the conduct of *fiduciaries*, while the "tax provisions" (§§ 1201 *et seq.*) apply to "disqualified persons," i.e., parties in interest, who violate the new prohibited transaction rules. *See* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted*

[18] The original House bill would have made only fiduciaries personally liable for losses resulting from a violation of the prohibited transaction rules but even then only if there was no adequate consideration for the transaction. The Senate version, by contrast, would have extended legal relief to both fiduciaries and parties in interest, even if there was adequate consideration. The conference substitute appears to reach a compromise between these extremes in a number of ways, including the inclusion of § 1132(a)(3) and (5) which, while otherwise limiting the availability of legal relief to defendant fiduciaries, permit recovery of only equitable relief from nonfiduciaries who violate the Act.



in, 1974 U.S.C.C.A.N. at 5076. The intent that Salomon attributes to this statement (that the remedies provided in § 1132(a) should be limited to fiduciaries, while the tax provisions apply to parties in interest) is based on an overly narrow reading of the statute and the legislative history. Although Congress incorporated principles of traditional trust law into the labor provisions, it does not mean that Congress did not intend to extend the use of those principles beyond parties who would have constituted fiduciaries at common law. To the contrary, the Conference Report specifically states that the labor provisions affect "parties-in-interest," distinguishing this broader range of people from the "disqualified persons" affected by the tax provisions. *Id.* at 5087. Moreover, ERISA, in part, is a direct reflection of Congress' determination that trust law does not offer adequate protection to employee benefit plans. *See Varity Corp.*, __ U.S. __, 116 S. Ct. at 1070.

Salomon finally argues that regardless of the statutory analysis, the Seventh Circuit has unquestioningly foreclosed private claims against a nonfiduciary for ERISA violations, including participation in § 1106(a) prohibited transactions. This conclusion is built on a multi-tiered argument. First, Salomon correctly points out that any relief sought under § 1132(a)(3) must be equitable in nature. Second, Salomon contends, the Seventh Circuit, in *Continental Casualty*, held that restitution sought from a nonfiduciary is only equitable when the claim for recovery is based on a theory of aiding and abetting, i.e., knowing participation in, a breach of fiduciary duties. But, *Continental Casualty*, embracing *Mertens*' dicta, has held that a nonfiduciary cannot be held liable under § 1132(a)(3) for knowing participation in an ERISA fiduciary's breach of its fiduciary duties. Thus, Salomon concludes, a claim for restitution against a nonfiduciary necessarily falls into one of two categories: either it constitutes a claim for legal relief and is barred by *Mertens*, or it is based on an aiding and abetting/knowing participation theory and is

barred by *Continental Casualty's* adoption of the *Mertens* dicta.

The court is not persuaded by this argument. In *Continental Casualty*, the Seventh Circuit merely expressed a belief, though ultimately unnecessary to its decision, that restitution is not an exclusively equitable remedy. *Continental Casualty*, 33 F.3d at 756. It explained that whether restitution is an equitable remedy turns on whether the duty giving rise to the claim is founded on legal or equitable principles. The court concluded that the claim before it (nonfiduciary's knowing participation in a breach of fiduciary duty) was founded on equitable principles. Contrary to Salomon's contention, however, it did not hold, or even suggest, that such a claim was the only one where a request for restitution from a nonfiduciary could be based on equitable precepts. Indeed, such a limitation would be inappropriate in light of traditional trust law which provides rules permitting equitable actions to regain improperly transferred trust property for reasons other than the recipient's knowing participation in the trustee's breach of its fiduciary duties. *See e.g.*, 4 A. Scott & W. Fratcher, *The Law of Trusts*, §§ 288-94 (4th ed. 1989); Restatement (Second) of Trusts, §§ 280-295 (1959)(both discussing recovery from gratuitous donees and from recipients of trust property via illegal transactions). Salomon is not entitled to summary judgment on this basis.

b. Failure of Proof

Salomon next argues that it is entitled to summary judgment because under *Continental Casualty*, plaintiffs must prove that Salomon knowingly participated in NISA's knowing breach of its fiduciary duties. In other words, there must be evidence that NISA, as APT's fiduciary, caused APT to enter into the Fee Agreements with knowledge that they were prohibited transactions and that Salomon participated in the transactions knowing they were prohibited and that NISA was breaching its fiduciary duty.



Here, plaintiff has provided proof that NISA was a fiduciary of the plan and that it caused APT to enter into the participation interest transactions. Moreover, there is sufficient evidence in the record relating to Salomon's earlier provision of services to NISA/APT to suggest that NISA knew or should have known that Salomon was a "person providing services to [APT]."[19] Nothing in the statute suggests that NISA had to have actual knowledge that the transaction was in fact illegal or that NISA qualified, legally, as a party in interest. Thus, the record is sufficient to raise a question of fact as to whether NISA knew or should have known that the transaction was a sale or exchange of property between the plan and a party in interest or for the benefit of a party in interest.

Moreover, as discussed above, Salomon's liability is premised on a direct violation of ERISA, and not, as Salomon argues, on secondary liability for knowing participation in NISA's breach. While Congress has made clear that § 1106 does not create a strict liability cause of action in the sense that even a blind transaction would constitute a prohibited transaction, *see* H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in*, 1974 U.S.C.C.A.N. at 5087, actual knowledge that the transaction was in fact prohibited does not appear necessary. Rather, knowledge that it was a service provider to an employee pension benefit plan and was engaging in a transfer of property with the plan or its fiduciary is enough. Plaintiffs' evidentiary submissions are sufficient to satisfy this standard. Salomon is not entitled to summary judgment with respect plaintiffs' claims that Salomon has violated § 1106(a)(1)(A) and (D).

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[19] ERISA broadly defines the term "party in interest" to include, among other things, "a person providing services to [a] plan." 29 U.S.C. § 1002(14)(B).

c. Availability of Restitution as a Remedy

Alternatively, and without much elaboration, Salomon argues that plaintiffs are barred from obtaining restitution because they affirmed the purchase of the Fee Agreement participation interests when they opted to sell APT's claims that were filed in MOA's bankruptcy proceeding. Plaintiffs respond that, as fiduciaries of APT, they were merely satisfying their duty to mitigate damages and to rid APT of an imprudent investment.

As a general rule, if a person continues to perform a contract after discovering facts which make it voidable (e.g., fraud), it is inferred that he has affirmed the contract and he is no longer entitled to avoid it and obtain restitution. *See* Restatement of Restitution § 68 (1937). Plaintiffs' sale of APT's claim in MOA's bankruptcy proceeding, however, is more akin to an attempt to preserve what APT had already invested than it is to continued performance. Such acts of preservation do not extinguish the right to restitution. *Id.* § 68 comment b. Moreover, the rule regarding affirmance of the contract appears, at least in part, to arise out of the requirement that the person seeking restitution tender back or at least offer to tender back the subject matter of the contract. *Soderberg v. Gens*, 652 F. Supp. 560, 565 (N.D. Ill. 1987). In this way, any potential unjust enrichment of the rescinding party is avoided. *See* Restatement of Restitution § 65. Acts of affirmance would necessarily be in conflict with the ability to tender. Here, however, plaintiffs claim that Salomon's misrepresentations caused NISA to purchase participation interests that were in fact worthless. As a result, no offer to restore the participation interests to Salomon is required. *Id.* § 65 comment e.

The court concludes, in light of the above principles, that the sale of APT's bankruptcy claims does not prevent this action for restitution.



d. Plaintiffs' Cross Motion

The conclusion that Salomon is not entitled to summary judgment, however, does not necessarily entitle plaintiffs to a favorable ruling with respect to their cross motion on count II. Salomon argues that plaintiffs' motion should be denied because there is a genuine issue of material fact regarding the applicability of Prohibited Transaction Exemption 75-1 ("PTE 75-1") in which the DOL and the Internal Revenue Service established a safe harbor for certain "customary securities transactions." PTE 75-1 provides that the prohibitions of § 1106 will not apply to "any purchase or sale of a security between an employee benefit plan and a broker-dealer . . . if [the enumerated] conditions are met." 40 Fed. Reg. at 50847. Plaintiffs respond that Salomon is not entitled to the protections of PTE 75-1 because the participation interests sold to APT are not "securities" and, even if they were, there is no evidence that the conditions specified in PTE 75-1 are satisfied.

The parties agree that the definition of a "security" in the federal securities laws controls whether the participation interests in the Fee Agreements constitute securities within the meaning of PTE 75-1. *See* 15 U.S.C. §§ 77b(1) and 78c(10). These statutes provide that a "security" is "any note, stock, treasury stock, bond, debenture, certificate of interest or participation in any profit-sharing agreement, . . . investment contract, . . . or in general, any instrument commonly known as a security . . . . *Id.* § 78c(10).[20] In addition to ordinary stock and bonds, it is intended to encompass "countless and

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[20] The definition of "security" set forth in 15 U.S.C. § 77b(1) is virtually the same and, in practice, the two definitions are considered interchangeable. *Secon Service System, Inc. v. St. Joseph Bank & Trust Co.*, 855 F.2d 406, 411 n.5 (7th Cir. 1988), *citing, Tcherepnin v. Knight*, 389 U.S. 332, 335-36, 88 S. Ct. 548, 553 (1967).

variable schemes devised by those who seek the use of the money of others on the promise of profits . . . ." *SEC v. W.J. Howey, Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 1103 (1946). It extends to many uncommon and irregular instruments, not just instruments traded at securities exchanges. *Marine Bank v. Weaver*, 455 U.S. 551, 556, 102 S. Ct. 1220, 1223 (1982). Nevertheless, the statute's broad sweep is tempered by the fact that "Congress intended the securities laws to cover those instruments ordinarily and commonly considered to be securities in the commercial world. . . ." *Id.* Moreover, instruments technically falling within the statutory description will not be considered a security if the context requires otherwise. 15 U.S.C. §§ 77b(1) and 78c(10); *Marine Bank*, 455 U.S. at 558, 102 S. Ct. at 1225.

As an initial matter, Salomon has moved to strike the affidavits of two law professors submitted in support of plaintiffs' motion. In the affidavits, the professors, both experts in securities law, set forth their opinions that the four Fee Agreements are not securities and that the sale of the participation interests (via the Assignments) do not constitute the sale of securities. While expert legal testimony may be appropriate in some circumstances, the court concludes that the affidavits of professors Coffee and Seligman go beyond that which proper. Rather than express their opinions regarding significant factual characteristics of securities in general, Professors Coffee and Seligman have started with certain assumptions about the legal definition of a security (presumably provided to them by plaintiffs' counsel) and then proceeded to evaluate the specific evidence in this case to determine what the "facts" are. In short, while the affidavits carry the added imprimatur of securities experts, they offer nothing more than legal argument typically supplied by a party's legal representative. On a motion for summary judgment, it is the duty of the court to construe the law, interpret the evidence in the appropriate manner and to determine whether there is any genuine issue of material fact



which necessitates a trial. Because the affidavits of plaintiffs' legal experts usurp this judicial function, they will be stricken.[21]

Salomon asserts that there is a genuine issue of fact as to whether the sale of the participation interests to APT constituted the sale of securities because the participation interests qualify as any one of four separate instruments contained in the statutory definition of security. More specifically, Salomon asserts that the participation interests qualify as "evidence of indebtedness," "participations in a profit sharing agreement," "investment contracts," or "other instruments commonly known as securities."

In *Howey*, 328 U.S. at 299, 66 S. Ct. at 1103, the Supreme Court established the test for determining whether a particular transaction constitutes an "investment contract" security. The salient characteristics of such a security are a transaction whereby a "person invests his money in a common enterprise and is led to expect profits solely from the effort of the promoter or a third party." *Id.* While this test does not apply to all the types of instruments set forth in the statutory definition, the Supreme Court later recognized that it is equally applicable to the general category of "instrument commonly known as a security." *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 691 n.5, 105 S. Ct. 2297, 2304-05 n.5 (1985). Further, the Seventh Circuit has held that the same requirements apply to the category of "participations in a profit sharing agreement." *Secon Service System, Inc. v. St.*

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[21] Anticipating the worst, Salomon submitted a counteraffidavit from a third law professor who opined that both the Fee Agreements and the Assignments constitute securities. Salomon states that this counteraffidavit is only to be considered in the event that the affidavits of plaintiffs' legal experts are not stricken. In light of the above ruling, the court has not considered this counteraffidavit.

*Joseph Bank & Trust Co.*, 855 F.2d 406, 411 (7th Cir. 1988), *citing, Hirk v. Agri-Research Council, Inc.*, 561 F.2d 96, 102 (7th Cir. 1977). Thus, these three categories may be considered together.[22]

To avoid summary judgment under the *Howey* test, there must be some evidence that there has been an 1) investment of money, 2) in a "common enterprise," 3) with an expectation of profits, 4) derived primarily from the efforts of a third party. Plaintiffs assert that Salomon cannot establish that the second element because APT was the only investor in the participation interests. Although there is a split among the circuits, the Seventh Circuit has consistently adhered to the belief that "horizontal commonality" is a necessary requirement to establish the common enterprise element of the *Howey* test.[23] *See e.g., SEC v. Lauer*, 52 F.3d 667 (7th Cir. 1995); *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016 (7th Cir. 1994); *Milnarik v. M-S Commodities, Inc.*, 457 F.2d 274 (7th Cir. 1972). This means that the transaction must involve not only a pooling of interests between a developer/promoter and an investor, but also among several investors. In other words, investors must have pooled their resources to obtain an undivided interest in a common asset from which they expect to obtain a profit based primarily on the efforts of others. Based on the record before this court, however, APT was the only actual investor in the participation interests.

[22] Salomon relies on *Reves v. Ernst & Young*, 494 U.S. 56, 110 S. Ct. 945 (1990), to argue that the *Howey* test does not apply when an instrument falls within any category of the statutory definition (other than investment contract), rather the instrument is presumed to be a security unless the context indicates otherwise. This argument is not persuasive. In *Reves*, the court reconfirmed its earlier statement in *Landreth* to the effect that the *Howey* test cannot be said to apply to every type of instrument listed in the statute. It then went on to establish its own test for "notes." Nothing in *Reves*, however, suggested that the Court believed the *Howey* test was inappropriate for participation interests or other instruments commonly known as securities.

[23] As pointed out in *Wals*, the Fifth, Eighth and Tenth circuits appear to require only "vertical commonality," which is present when the interests of the promoter and an individual investor are connected. *Wals v. Fox Hills Development Corp.*, 24 F.3d 1016, 1017 (7th Cir. 1994).



Salomon argues that APT was not the only investor because Salomon retained an undivided 5% interest in three of the four Fee Agreements and, like APT, expected to receive it share of MOA/Best Inns' profits associated with that interest. Additionally, Salomon points out, MOA/Best Inns only agreed to pay Salomon a portion of the profits from the motel operations and, therefore, MOA/Best Inns also had an undivided, shared expectation of profit. This argument is unpersuasive. The clear implication of this circuit's interpretation of the *Howey* test is that several investors must pool their resources with the expectation that another's use of that money will produce a profit or return on their investment. Under the record in this case, Salomon cannot be characterized as such a passive investor who has jointly pooled its funds with APT. Each of the Fee Agreements expressly provide that any payments to be made are consideration for Salomon's work in placing the mortgage notes issued by MOA/Best Inns. This suggests that money Salomon expected to receive was compensation for services performed, not a return or profit on an investment. Although Salomon presents evidence that the impetus behind the Fee Agreements was Salomon's decision to place its own money at risk by serving as a principal and purchasing the underlying mortgage notes (rather than simply acting as a placing agent), this evidence does not alter the essential character of the payments to Salomon under the Fee Agreements. Salomon's "investment" was in the mortgage notes, the Fee Agreements were compensation for its services. Similarly, Salomon's rather novel argument that MOA/Best Inns' retention of a certain percentage of its prof-

its makes MOA and Best Inns co-investors for purposes of establishing horizontal commonality is not convincing. Clearly, profit to the companies would result from their operation and management of the motel properties, not from a passive investment of money therein.

Even if APT were the only investor in the participation interests, Salomon further argues that *Lauer*, the Seventh Circuit's most recent "common enterprise" case, essentially eliminated the requirement of actual horizontal commonality. In *Lauer*, the defendant promoter of a fraudulent investment program attempted to avoid application of the securities laws by arguing that he only persuaded one person to actually invest in the scheme. The court concluded that it was appropriate to judge the promoter's offering as what he represented it to be. In other words, where part of the alleged fraud is that the instrument for sale is a security when it is nothing of the kind, the defrauding promoter is estopped to deny the existence of a security. In reaching it conclusion, the court reasoned that "it is the character of the investment vehicle, not the presence of multiple investors, that determines whether there is an investment contract." *Lauer*, 52 F.3d at 670. Although the context in which *Lauer* was decided is distinct from the present case, the reasoning of the court suggests that horizontal commonality cannot be determined solely from the *actual* presence of multiple investors. Rather, the court must assess the intended character of the instrument. In this way, the existence of security status is protected against the fortuity that only one person in fact chooses to invest.

Here, Salomon has offered evidence that an offering memorandum was prepared with respect to the sale of the participation interests in the first three Fee Agreements and that such a memorandum was drafted but never completed with respect to Fee Agreement IV. The record also reveals that NISA/APT received the offering memoranda. All of these memoranda referred to multiple investors. Further,



Salomon personnel have testified that other potential investors were contacted with respect to participating in Fee Agreement I and that Salomon was prepared to seek out other investors if APT did not buy the participations in Fee Agreements I-IV. These pieces of evidence, while not particularly persuasive, are sufficient at this juncture to raise a question of fact regarding the intended character of the participation interests. Thus, on this record, there remains a genuine issue as to whether the participation interests are securities within the meaning of PTE 75-1.

But, plaintiffs argue, even if the participation interests might be a security, summary judgment is appropriate because PTE 75-1 only exempts securities sold under certain conditions and there is no evidence that one of those conditions is satisfied.[24] More specifically, they assert that Salomon has not offered any evidence that the transactions were as favorable to APT as an arms-length transaction with an unrelated third party would have been. A review of the record, however, reveals that Salomon has provided at least some proof indicating that an unrelated party might have paid a similar price for the participation interests. For example, for unrelated purposes, Salomon itself valued the Fee Agreements at approximately the value which the parties eventually ascribed to them. While such evidence may not ultimately be sufficient to carry the day, when taken in a light favorable to Salomon, it is enough to avoid summary judgment. Whether the transaction was as favorable to APT as an arms-length transaction would have been necessarily involves a highly factual determination of the fair market value of the participation interests. The court is not prepared to

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[24] Plaintiffs' argument that PTE 75-1 is inapplicable because the Fee Agreements were not "customary" securities and were not subject to close regulation lacks force. Those factors are not required to qualify for the exemption. *See* 40 Fed. Reg. at 50847.

conclude that there is no genuine issue of fact in that regard. Because there remains a triable issue of fact with respect to the applicability of PTE 75-1, plaintiffs also are not entitled to summary judgment with respect to count II.

**Count III**

Count III alleges that Salomon knowingly participated in NISA's breach of its fiduciary duties to APT by selling the interests in the fee agreements to NISA for APT's benefit. In other words, plaintiffs contend that Salomon is secondarily liable for its knowing participation in NISA's involvement in a § 1106 prohibited transaction. Salomon argues that it is entitled to summary judgment because *Mertens* and *Continental Casualty* make clear that ERISA does not provide a cause of action against nonfiduciaries for knowing participation in another person's fiduciary breaches. Plaintiffs respond that *Mertens* and *Continental Casualty* are not controlling in light of Salomon's status as a party in interest.

Plaintiffs' attempt to avoid the rule of *Continental Casualty* is without force. As discussed above, the Seventh Circuit, relying on the *Mertens* dicta, specifically held that nonfiduciaries cannot be found liable for knowing participation in another person's fiduciary breaches. This rule is equally applicable to nonfiduciaries who also happen to be parties in interest. While this may appear to be at odds with the above discussion regarding count II, it is not. The confusion stems from the fact that the alleged fiduciary breach happens to be NISA's participation in a § 1106 prohibited transaction. As discussed above, nonfiduciary parties in interest may be held liable under § 1132 for their own involvement in a prohibited transaction because § 1106 can be read to affirmatively impose an obligation of parties in interest to avoid such transactions. Their status as a party in interest, however, does not subject such persons to derivative liability for another's violation of ERISA. Thus, to the extent that Salomon participated in a prohibited transaction, it



may be found directly liable under count II. Salomon cannot otherwise be held accountable to plaintiffs for damages as alleged in count III. For these reasons, Salomon is entitled to summary judgment with respect to count III.

**Statute of Limitations**

Salomon further argues that, at the very least, the running of the statute of limitations entitles it to summary judgment with respect any cognizable ERISA claim arising out of the sale of the participation interests in Fee Agreements I and II. A plaintiff must bring claims for ERISA violations within six years after the date of the last action which constituted the violation or three years after the plaintiff had actual knowledge of the alleged violation, whichever is earlier. 29 U.S.C. § 1113. Because APT knew the parties to the transactions and their relationship to the plan at the time NISA purchased the participation interests in Fee Agreements I and II (on October 28, 1987 and April 28, 1988, respectively), Salomon submits that plaintiffs had actual knowledge of the alleged § 1106 violation at the time of the closings. Despite this knowledge, plaintiffs did not commence this action until March 27, 1992. Plaintiffs respond that Ameritech's employees and NISA did not understand that any of the participation interests violated ERISA until sometime in 1990 and that Salomon repeatedly misled NISA and APT regarding the viability of the MOA/Best Inns portfolios.

Actual knowledge under 29 U.S.C. § 1113 only requires knowledge of the essential facts of the illegal transaction, not its illegality. *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078, 1086 (7th Cir. 1992). Nevertheless, mere notice that something is awry is not enough, the plaintiff must have specific knowledge of the facts that would establish the breach of duty upon which he sues. *Radiology Center, S. C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1222 (7th Cir. 1990). Yet, as Salomon has so carefully pointed out, here there are factual questions whether the sales of the

participation interests fall within the safe harbor provisions of PTE 75-1. Assuming that the participation interests do not constitute securities, as plaintiffs argue, then knowledge of the essential facts would seem to require no more than knowing the parties to the transaction and their relationship to APT. Plaintiffs do not argue that they were unaware of those facts at the time of the closings on Fee Agreements I and II. On the other hand, if it is determined that the participation interests are securities, then the essential facts of which plaintiffs would need specific knowledge would include information that the transaction was not as favorable to APT as an arms-length transaction with an unrelated third party would have been. Plaintiffs' evidence that Salomon misled NISA and APT regarding the viability of the MOA/Best Inns portfolios until sometime in 1990 creates a question of fact as to when plaintiffs gained that knowledge which was essential to their claim. Any ruling on the statute of limitations issue is, therefore, premature.

**Salomon's Counterclaims for Contribution**

In its counterclaims, Salomon alleges that if it is liable to APT for any breach of duty (count I) or for any transactions which violated ERISA § 1106 (count II), then it is entitled to contribution from Ameritech because Ameritech similarly must have breached its duties to APT. Plaintiffs assert that there is no right of contribution under ERISA, but even if there is, Ameritech is entitled to summary judgment in its favor because the undisputed evidence establishes that NISA controlled the decision to invest in the Fee Agreements and to the extent that the available relief is equitable, contribution is inappropriate.

In a well reasoned ruling on plaintiffs' earlier motion to dismiss Salomon's counterclaims, Judge Aspen rejected plaintiffs' argument that there is no right to contribution under ERISA. The court is not inclined to revisit this issue. Plaintiffs have failed to identify any specific changes in the



law that would affect that ruling. Moreover, regardless of whether there may be some right to contribution under ERISA, Salomon has no such right here. In light of the above rulings, the only remaining ERISA cause of action is Salomon's alleged violation of § 1106 based on its status as a party in interest and its participation in prohibited transactions. As a result, the recovery plaintiffs seek is limited to "appropriate equitable relief" such as restitution of the amount by which Salomon has been unjustly enriched. Unlike the damages that may have been available if Salomon had been a fiduciary of APT, "liability for [its] own ill-gotten gains cannot be shifted, even to one more culpable." *Framingham Union Hosp., Inc. v. Travelers Ins. Co.*, 744 F. Supp. 29, 33 (D. Mass. 1990). This distinction makes sense. While a plaintiff's damages may result from the actions of more than one defendant, when recovery is based on the amount by which the defendant is unjustly enriched, there is no similar responsibility to be apportioned. The defendant unfairly received whatever it received. Thus, even if Ameritech breached a fiduciary duty vis a vis APT and may itself be liable in damages for its own breach of care, Salomon cannot shift the burden of paying whatever amount it may have unfairly received as a result of its alleged violation of ERISA § 1106.[25] Plaintiffs are entitled to summary judgment with respect to Salomon's counterclaims for contribution.

**ORDER**

For the foregoing reasons, it is hereby ordered as follows:

1. Defendants' Motion to Strike Affidavits of Plaintiffs' Proposed Law Professor "Experts" is granted.

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[25] This conclusion makes it unnecessary to consider plaintiffs' evidentiary argument that only NISA made the decision to invest in the Fee Agreements.

2. Defendants' Motion to Strike Certain Evidence relied upon in plaintiffs' July 11, 1995 12N Response is denied as moot in light of the other rulings contained herein.

3. Defendants' Motion for Summary Judgment on Plaintiffs' Federal Claims is granted as to counts I and III of the Second Amended Complaint and as to any claims contained in count II which are premised on an alleged breach of fiduciary duty. It is denied in all other respects.

4. Plaintiffs' Motion for Partial Summary Judgment is denied with respect to count II of the Second Amended Complaint and granted with respect to defendants' counterclaims for contribution.

5. The parties are directed to engage in good faith settlement discussions in an attempt to mutually resolve all remaining claims and if, despite the parties' sincere efforts, a settlement is not reached, the parties are further directed to agree on a briefing schedule for Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims. This matter is set for status on July 15, 1996 at 2:00 p.m.

/s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: June 13, 1996



IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

EASTERN DIVISION

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| HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, Plaintiffs, | ) CIVIL ACTION ) No. 92 C 5883 |
| vs. | ) Magistrate ) Judge Lefkow |
| SALOMON BROTHERS INC and SALOMON BROTHERS REALTY CORP., Defendants. | ) DOCKETED ) SEP. 10, 1996 |

**[PROPOSED] ORDER MODIFYING THIS COURT'S DECISION TO CONFIRM THAT STATEMENTS OF THE FACTS IN THE DECISION CONSTITUTE A STATEMENT OF THE NON-MOVING PARTY'S EVIDENCE**

It is hereby ordered that this Court's Memorandum Decision and Order, dated June 13, 1996 and filed June 18, 1996, is modified by the addition of the following paragraph to the bottom of page 3 of the Memorandum Decision

> Unless otherwise expressly stated, statements of the facts in the section of the Decision entitled "Factual Background" or elsewhere in the Decision constitute statements of the non-moving party's evidence or reasonable inferences therefrom viewing the evidence in the non-moving party's favor, and do not constitute rulings or findings of fact by this Court.

/s/Joan H. Lefkow
U.S.M.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| HARRIS TRUST, et al., | ) | |
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| Plaintiffs, | ) | |
| | ) | |
| vs. | ) | No. 92 C 5883 |
| | ) | |
| SALOMON BROTHERS, INC., et al., | ) | |
| | ) | |
| Defendants. | ) | |

**RULING ON MOTION TO RECONSIDER OR CERTIFY FOR IMMEDIATE APPEAL**

Joan H. Lefkow, Magistrate Judge

Salomon has asked the court to reconsider two portions of its June 13, 1996 Memorandum Decision in light of the Supreme Court's recent decision in *Lockheed Corp. v. Spink*, 116 S. Ct. 1783, 1996 WL 305742 (June 10, 1996). Salomon urges that *Lockheed*'s discussion of ERISA § 1106(a) makes it clear that there is no private right of action against a nonfiduciary party in interest who engages in a transaction prohibited by § 1106, but even if there were, that it is limited to circumstances where a nonfiduciary has knowingly participated in a fiduciary's violation of § 1106. As a result, Salomon argues, the Seventh Circuit's decision in *Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (7th Cir. 1994), would bar the claim.

As previously stated in open court, the *Lockheed* decision does not necessitate reconsideration of this court's June 13 Decision. Although the Court in *Lockheed* found that to



sustain a claim under § 1106(a), a plaintiff must show that a fiduciary caused the plan to engage in one of the transactions identified in that section, it did not state or even suggest that a nonfiduciary party in interest who benefitted from such an impermissible transaction cannot be held liable for restitution once such a showing is made. *Lockheed*, 116 S. Ct. at 17888-89, 1996 WL 305742, at *4. To the contrary, the Court specifically noted that the appellate court in *Lockheed* "was not necessarily wrong in saying that 'a party in interest who benefitted from an impermissible transaction can be held liable under ERISA.'" *Id.* at n.3. The Ninth Circuit's error was that it found the employer party in interest liable without even asking whether a fiduciary caused the plan to enter into the transaction, i.e., there was insufficient proof that the transaction from which the party in interest benefitted was impermissible under § 1106(a).

As noted in the June 13 Decision, plaintiff has provided some proof that NISA was a fiduciary of the plan, that NISA caused APT to enter into the transactions at issue and that Salomon is a party in interest who benefitted from the transactions. Assuming these facts ultimately are proved, the transactions would be impermissible because they were outside the scope of NISA's lawful authority. Under such circumstances, *Lockheed* does not preclude holding Salomon liable under ERISA for restitution of the benefits it received from the transactions. The court further disagrees that the Court's reasoning in *Lockheed* effectively limits recovery against nonfiduciary parties in interest to those situations where the party in interest "knowingly participates" in the fiduciary's breach of its fiduciary duties. For the reasons amply discussed in the June 13 Decision, the court concludes that nonfiduciary parties in interest may be held responsible for their direct participation in or as beneficiary of § 1106(a) transactions. This is separate from the question whether they may be held liable for their knowing aid to the fiduciary in causing the plan to engage in the transaction—a question that

is not before this court. The motion for reconsideration will be denied.

Alternatively, Salomon seeks certification of two specific issues for appeal to the Seventh Circuit Court of Appeals under 28 U.S.C. § 1292(b). As a general matter, certification of a question for interlocutory appeal is the exception, not the rule. Nevertheless, a district court has discretion to grant such a motion where 1) the matter to be appealed involves a controlling question of law, 2) on which there is substantial ground for difference of opinion, and 3) immediate appeal could materially advance the ultimate termination of the litigation. 28 U.S.C. § 1292(b).

Plaintiffs' have not seriously disputed the first of these factors. Indeed, the determination from which Salomon seeks leave to appeal—the availability and scope of a private right of action under ERISA for equitable relief against nonfiduciary parties in interest—if incorrect, would seemingly lead to the dismissal of plaintiffs' only remaining federal claim. The second factor—whether there is a substantial ground for difference of opinion on the issue(s) be appealed—is hotly disputed. Salomon, of course, believes that under *Lockheed* a private right of action against a nonfiduciary party in interest is nonexistent or, at the very least, its existence is an open question. Plaintiffs, by contrast, believe that the decision in *Lockheed*, merely confirms that which the circuit courts, at least those which have considered the issue, have already recognized, namely, that there is such a private right of action. Although a number of circuit courts have recognized a cause of action and this court was ultimately persuaded to agree, that alone does not demonstrate that there is no substantial ground for difference of opinion. In ruling on the parties' cross-motions for summary judgment, each side offered an abundance of thoughtful arguments to support their respective positions. Thus, even though this court concluded that plaintiffs' arguments and authority were more persuasive, it cannot be



said that the arguments supporting an opposite conclusion were insubstantial.

Nevertheless, before an issue can be certified for appeal, the district court must further be convinced that immediate appeal from the order in question will materially advance the ultimate termination of the litigation. The court does not believe that Salomon has made such a showing. If the appellate court upholds this court's ruling, it would offer little benefit in terms of simplifying the issues for trial and it would disadvantage both parties by delaying the final resolution of a matter that has already been in litigation more than four years, before two different judges. Even assuming that the Seventh Circuit were to reverse the June 13 Decision, it is highly likely that the parties would move forward toward a trial of the remaining issues. While the burden of trial might be shifted to another court, e.g., state court, an immediate appeal would not certainly advance the ultimate termination of the litigation. Indeed, the delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter suggest that regardless of the outcome, an immediate appeal would be a disservice to the litigants and the general administration of justice.

**ORDER**

For the reasons stated, it is hereby ordered that defendant's motion for reconsideration of this court's decision and order of June 13, 1996 or, in the alternative, to amend the court's order so as to certify it for interlocutory appeal [Docket Nos. 196-1 and -2] is denied in its entirety. Plaintiffs are further directed to file their response to Salomon's Alternative Motion for Summary Judgment on Plaintiffs' State Law Claims [Docket No. 122] on or before October 25, 1996, and defendant shall file any reply thereto on or before November 8, 1996.

ENTER:

/s/ Joan H. Lefkow
JOAN HUMPHREY LEFKOW

Dated: September 24, 1996



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| HARRIS TRUST, et al.,<br><br>Plaintiff,<br><br>v.<br><br>SALOMON BROTHERS, INC., et al.,<br><br>Defendant. | Case No. 92 C 5883 |

**MEMORANDUM DECISION**

Joan H. Lefkow, Magistrate Judge:

This suit seeks recovery for alleged violations of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and state law. Before the court is defendants' motion for summary judgment with respect to plaintiffs' three state law claims.[1] In an earlier ruling, this court denied defendants' motion for summary judgment with respect to Count II of plaintiffs' Second Amended Complaint which seeks to hold defendants liable for participating, as

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[1] As a result of earlier rulings by the court, Counts II and VIII-X of the Second Amended Complaint are all that remain at issue. The three state law claims, set forth in Counts VIII-X, allege that defendants engaged in common law fraud, statutory fraud under the Illinois Consumer Fraud Act and negligent misrepresentation.

parties in interest, in transactions prohibited by ERISA § 1106(a). In light of that ruling, defendants urge that the remaining state law claims are preempted by ERISA § 1144(a). Alternatively, defendants assert that Counts VIII through X fail on their merits. For the reasons set forth below, the Court concludes that § 1144(a) precludes the alleged state law remedies and, therefore, it is unnecessary to consider defendants' alternative arguments.

## BACKGROUND[2]

Ameritech Corporation ("Ameritech") sponsors and administers two pension plans which qualify as employee pension benefit plans under ERISA. The plans are funded through Ameritech Pension Trust ("APT"). Each plaintiff herein is a fiduciary of APT within the meaning of ERISA. During the 1980's and thereafter, defendants furnished services to the plans by acting as a broker-dealer on numerous debt and equity transactions for the plans. Between 1987 and 1989, defendants further offered to sell APT their interest in four separate fee agreements which granted them rights to participate in the net cash flow, sale or refinancing proceeds, and property appreciation associated with certain motel properties. APT, using Ameritech plan assets, purchased either 95% or 100% of defendants' interest in each of the fee agreements.

Plaintiffs allege that, as a result of defendants' service to the plans, defendants were parties in interest to the plans and therefore, § 1106(a) categorically prohibited each of the fee agreement transactions.[3] Plaintiffs further allege that in an

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[2] This brief description is solely intended to provide context and clarity. The court assumes the reader's familiarity with the facts set out in several earlier opinions in this case.

[3] The pertinent portions of § 1106(a) provide that

(1) A fiduciary with respect to a plan shall not cause

(...continued)



effort to induce APT's purchase of defendants' interests in the third and fourth fee agreements, defendants deliberately and/or negligently withheld certain adverse information concerning the performance of the underlying motel properties, as well as adverse developments affecting the value of the first two fee agreements. Plaintiffs submit that during negotiations for and after the closing of the transactions, defendants continued to make intentional falsely positive representations regarding the motel properties and their investment value or otherwise failed to disclose information which would have alerted plaintiffs to the precarious condition of the investments.

## ANALYSIS

ERISA § 1144(a) provides that ERISA "shall supersede any and all State laws insofar as they ... relate to any employee benefit plan" covered by the statute. 29 U.S.C. §

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> the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> * * * *
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(A)(1)(A) & (D). In this court's Memorandum Decision of June 13, 1996, the court determined that despite the absence of explicit language in § 1106(a), ERISA's legislative history and the case law interpreting § 1106(a) indicate that nonfiduciary parties in interest have a duty to abstain from the transactions prohibited by that provision. Further, ERISA's civil enforcement provisions authorize a private right of action against nonfiduciary parties in interest who engage in § 1106 transactions. See 29 U.S.C. § 1132(a)(3).

1144(a). This provision reflects Congress' intent to subject plans and plan sponsors to a uniform body of benefits law. *New York State Conference of Blue Cross & Blue Shield Plans* v. *Travelers Insurance Co.*, 514 U.S. 645, 656-57, 115 S.Ct. 1671, 1677 (1995), *citing, Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133, 142, 111 S.Ct. 478, 484 (1990). The Supreme Court has acknowledged that the plain language of § 1144(a) is expansive and that a law may "relate to" an employee benefit plan as long as it "has a connection with or reference to" such a plan. *Travelers*, 514 U.S. at 656, 115 S.Ct. at 1677, *citing, Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2900 (1983). Thus, preemption may occur even where a state law is "not specifically designed to affect such plans, or the effect is only indirect." *Ingersoll-Rand*, 498 U.S. at 139, 111 S.Ct. at 483. Moreover, common law causes of action, like those at issue herein, are included within the "state law" which may be preempted. *Id.* at 142, 111 S.Ct. at 484.

Nevertheless, recent Supreme Court decisions teach that the reach of ERISA's preemption clause is not boundless. *See De Buono* v. *NYSA-ILA Medical and Clinical Services Fund*, 117 S.Ct. 1747, (1997); *California Division of Labor Standards Enforcement* v. *Dillingham Construction, N.A., Inc.*, 117 S.Ct. 832 (1997); *Travelers*, 514 U.S. at 645, 115 S.Ct. at 1671. Instead, courts must start with the presumption that federal law does not supplant state law unless Congress clearly and manifestly intended to do so and must use the objectives of the ERISA statute as a guide to that intent. *De Buono*, 117 S.Ct. at 1751; *Travelers*, 514 U.S. at 654, 115 S.Ct. at 1676-77. If a state law of general applicability has no more than an incidental effect on an ERISA plan, such as the indirect economic influence at issue in *De Buono*, *Dillingham* and *Travelers*, it will not be preempted.

In light of the above principles, it has been recognized that § 1144(a) preempts common law causes of action brought by



ERISA plan participants or beneficiaries seeking benefits or challenging allegedly improper handling of claims. *See, e.g., Pilot Life Insur.* v. *Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549 (1987). Likewise, state laws which, by word or effect, mandate particular employee benefit structures or administration have been determined to be "related to" ERISA plans. *See, e.g., FMC* v. *Holliday*, 498 U.S. 52, 111 S.Ct. 403 (1990). Other courts have looked to whether the state law regulates a relationship that is also regulated by ERISA or provides an alternative enforcement mechanism to one provided by ERISA. *See, e.g., General American Life Insur. Co.* v. *Castonguay*, 984 F.2d 1518 (9th Cir. 1993) (relationships); *Ingersoll-Rand*, 498 U.S. at 142, 111 S.Ct. at 484 (alternative enforcement mechanism).

Applying these preemption principles to the circumstances of this case, it clear that the area of tort law asserted in Counts VIII-X has been a field traditionally occupied by the states. As such, defendants bear a considerable burden to overcome the starting presumption against preemption. *De Buono*, 117 S.Ct. at 1752. This court concludes, however, that ERISA's goals and its legislative history evidence Congress' manifest intent to preempt state tort law insofar as it applies to parties in interest who have engaged in transactions prohibited by ERISA § 1106. This court previously determined that ERISA authorizes a cause of action against nonfiduciary parties in interest who have engaged in § 1106(a) prohibited transactions. *See* Memorandum Decision of June 13, 1996. As the Supreme Court has stated, one of Congress' primary concerns in enacting ERISA was the mismanagement of plan funds. *Massachusetts* v. *Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 1673 (1989). To that end, Congress chose, among other things, to flatly prohibit certain transactions which it believed to be particularly problematic. *Comm'r. of Internal Revenue* v. *Keystone Consol. Industries, Inc.*, 508 U.S. 152, 160, 113 S.Ct. 2006, 2012 (1993) ("Congress' goal [in §

1106(a)] was to bar categorically a transaction that was likely to injure the pension plan."). Moreover, Congress specifically authorized plans to seek equitable relief from parties in interest, like defendants, who have allegedly engaged in such transactions. *See* 29 U.S.C. § 1132(a)(3).

ERISA's legislative history[4] provides further insight regarding the extent to which Congress intended to preempt state law when a case involves parties to a § 1106 prohibited transaction. As discussed in this court's June 13, 1996 Memorandum Decision, Congress considered, but rejected, the idea of permitting plaintiffs to recover legal damages from nonfiduciary parties in interest who engaged in prohibited transactions. Instead, ERISA expressly limits the available remedy to equitable relief. 29 U.S.C. § 1132(a)(3). To allow plaintiffs to proceed with their state law claims, then, would thwart the balance that Congress struck. As the Supreme Court has stated, "[t]he deliberate care with which ERISA's civil enforcement remedies were drafted and the balancing of policies embodied in its choice of remedies argue strongly for the conclusion that ERISA's civil enforcement remedies were intended to be exclusive." *Pilot Life*, 481 U.S. at 54, 107 S.Ct. at 1556-57.

Plaintiffs argue that the policy considerations at issue in their fraud and negligent misrepresentation claims are not the same concerns that ERISA is meant to address. While plaintiffs' federal and state claims certainly have their differences, e.g., the required degree of intent, plaintiffs' state law claims arise out of and are inextricably intertwined with the alleged prohibited transactions. Moreover, it must be recognized that Congress struck a bargain in this regard. It

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[4] The specifics of the legislative history, which were discussed in detail in this court's June 13, 1996 Memorandum Decision, will not be set out here.



provided parties such as plaintiffs here with broader protection than would otherwise be available, e.g., under § 1106 defendants are held to a standard that approximates strict liability when they participate in a prohibited transaction. In exchange, however, it took away plaintiffs' right to legal relief from parties in interest who have engaged in prohibited transactions. The court concludes that the rejection of legal relief further confirms Congress' intention to make § 1132(a)(3) plaintiffs' exclusive remedy, thus preempting state law to the extent that it might provide additional remedies related to prohibited transactions. *Accord Contract Cleaning Maintenance, Inc.* v. *Marks*, 1996 WL 264724, *2-3 (N.D. Ill. May 15, 1996). To the extent that plaintiffs have cited decisions where state law claims were not preempted vis a vis third parties who provided services to an ERISA plan, e.g., negligent performance of their services, those decisions are inapplicable to the specific circumstances here. None involved a service provider's involvement in a transaction specifically regulated and prohibited by ERISA as is alleged here.

ORDER

For the reasons stated above, defendants' alternative motion for summary judgment on plaintiffs' state law claims [Docket No. 122-1] is granted with respect to Counts VIII-X of the Second Amended Complaint.

ENTERED:

/s/ Joan Humphrey Lefkow
JOAN HUMPHREY LEFKOW
United States Magistrate Judge

Dated: September 30, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

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| HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON, Plaintiffs, | ) CIVIL ACTON<br>) NO. 92 C 5883<br>)<br>) MEMORANDUM AND ORDER<br>) ON DEFENDANTS' RENEWED<br>) MOTION (1) TO AMEND JUDGE<br>) LEFKOW'S JUNE 1996 ORDER<br>) TO CERTIFY THE ORDER FOR<br>) INTERLOCUTORY APPEAL PUR-<br>) SUANT TO 28 U.S.C. § 1292 |
| vs. | ) (b), OR (2) TO RECONSIDER<br>) RULINGS ON TWO CONTROL- |
| SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP., Defendants. | ) LING LEGAL ISSUES IN JUDGE<br>) LEFKOW'S JUNE 1996 ORDER<br>) |

The plaintiffs filed this action against the defendants in September 1992. Through numerous motions and orders, most of the plaintiffs' original claims have been dismissed. At the present time, only one claim remains. The case has been assigned to me from Judge Lefkow, and the defendants have filed a renewed motion (1) to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), or (2) to reconsider rulings on two controlling legal issues in Judge Lefkow's June 1996 order. Both parties have filed briefs, and I have reviewed the relevant documents in this case. I shall grant the defendants' renewed motion to amend Judge Lefkow's June 1996 order to certify the order for interlocutory appeal.

## ANALYSIS

The defendants motion to certify for interlocutory appeal involves two issues:



1) Does 29 U.S.C. § 1132(a)(3) affirmatively authorize a private right of action against a nonfiduciary party-in-interest who participated in a transaction with a pension plan prohibited by 29 U.S.C. § 1106(a), and

2) If so, is proof that such nonfiduciary party-in-interest knew it was a service provider to a pension plan and was engaged in a transfer of property with the plan or its fiduciary sufficient to hold such nonfiduciary liable under such private right of action—even if there is no proof that such nonfiduciary (i) knew that the transaction was a nonexempt prohibited transaction in violation of 29 U.S.C. § 1106(a) and (ii) knew that the fiduciary had caused the plan to engage in such transaction in breach of its fiduciary duties.

The statutory authority allowing for interlocutory appeals is found in 28 U.S.C. § 1292(b). This section gives the district court discretion to grant a motion for interlocutory appeal in cases where (1) the matter being appealed involves a controlling question of law, (2) as to which there is substantial ground for difference of opinion, and (3) where an immediate appeal from the order may materially advance the ultimate termination of the litigation.

I concur with Judge Lefkow's finding that the matters being appealed involve controlling questions of law and that even though she determined that a private right of action exists under § 1132, there is still a substantial ground for difference of opinion on this issue. Therefore, the first two factors for determining whether I may grant a motion for interlocutory appeal are met to my satisfaction. However, in order for me to amend Judge Lefkow's previous order and grant the defendants' motion for interlocutory appeal, I must find that an immediate appeal may materially advance the ultimate termination of the litigation.

Judge Lefkow denied the defendants' motion to certify this issue for interlocutory appeal on September 24, 1996.

One reason for denying the defendants' motion was that "[e]ven assuming that the Seventh Circuit were to reverse the June 13 decision, it is highly likely that the parties would move forward toward a trial of the remaining issues." *See* 9/24/96 Order at 4. Also, Judge Lefkow found that a reversal might shift the burden of trial to a state court, and the "delays attendant with familiarizing yet another judge with the complex facts and legal issues surrounding this matter . . . would be a disservice to the litigants and the general administration of justice." *Id.* at 4-5. For these reasons, Judge Lefkow held that immediate appeal would not materially advance the ultimate termination of the litigation.

Subsequent to Judge Lefkow's September 24, 1996, order the defendants filed a motion for summary judgement on the plaintiffs' state law claims. Judge Lefkow granted the defendants' motion. Therefore, only one claim remains and there is no longer a concern that the parties would likely move forward to trial should the Seventh Circuit reverse Judge Lefkow's rulings. Additionally, the case has now been transferred to me, and so it is inevitable that a new judge will have to familiarize himself or herself with the complex facts and legal issues surrounding this case. Therefore, the two main reasons that Judge Lefkow denied the defendants' motion are no longer relevant, and it seems to me that an immediate appeal may materially advance the ultimate termination of the litigation.

Since I find that there is substantial ground for difference of opinion as to these controlling questions of law and that an immediate appeal from Judge Lefkow's order may materially advance the ultimate termination of this litigation, I shall certify an interlocutory appeal from Judge Lefkow's September 24, 1996, order pursuant to 28 U.S.C. § 1292(b).

**IT IS THEREFORE ORDERED** that the defendants' renewed motion to amend Judge Lefkow's June 1996 order



to certify the order for interlocutory appeal is granted in accordance with this order.

Dated January 7, 1998

BY THE COURT

s/Warren K. Urbom
United States Senior Judge

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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No. 98-1812

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

Plaintiffs-Appellees,

v.

SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,

Defendants-Appellants.

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Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 92-C-5883—Joan Humphrey Lefkow, Magistrate Judge.

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**ARGUED NOVEMBER 30, 1998—DECIDED JULY 6, 1999**

Before FLAUM, KANNE, and EVANS, Circuit Judges.

EVANS, Circuit Judge. The Employee Retirement Income Security Act (ERISA) prohibits certain transactions between an employee pension plan and its service providers who are deemed "parties in interest" under the Act. In this case we decide whether ERISA provides a private cause of action against a party in interest for engaging in such prohibited transactions.

In the late 1980's defendant Salomon Brothers Inc. set up financing for two motel chains, Motels of America, Inc. and



Best Inns, Inc., to acquire large blocks of motel properties throughout the country. In four separate transactions the companies initially sold mortgage notes secured by the acquired properties to Salomon, who in turn sold the notes to institutional investors. In exchange for its services Salomon received a participation interest in each group of motel properties which entitled it to a percentage of the "net cash flow" generated by the properties plus a percentage of any appreciation in the properties' value.

During this same time period Salomon also provided broker-dealer services to plaintiff Ameritech Pension Trust (APT), which holds assets for Ameritech Corporation's employee pension plans. Ameritech had appointed National Investment Services of America, Inc. (NISA) to serve as investment manager to APT. In 1987 Salomon offered to sell its participation interests in the Motels of America and Best Inns motel properties to APT as an investment. After extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motel properties for over $20 million. In the early 1990's the nationwide market for hotel and motel real property collapsed, and APT suffered a considerable loss on its investment.

In 1992 APT's newly appointed trustee, Harris Trust and Savings Bank, sued Salomon (and a related company, but we can disregard that detail), seeking to hold it liable for APT's loss on the motel property participation interests. Among the 12 claims in the initial complaint were three ERISA claims relevant here: (1) a claim that Salomon was a fiduciary that had breached its duties to the plan under Title 29 U.S.C. § 1104; (2) a claim that Salomon was a fiduciary that caused the plan to engage in prohibited transactions under § 1106(a); and (3) an alternative claim that Salomon as a nonfiduciary had knowingly participated in a breach of a § 1104 duty by plan fiduciaries.

After the plaintiffs filed suit, we held in another case, based on Supreme Court dicta, that ERISA does not provide a private cause of action against a nonfiduciary for participation in a fiduciary's breach of duty. *See Reich v. Continental Cas. Co.*, 33 F.3d 754, 757 (1994); *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993). This holding effectively knocked out the plaintiffs' third claim. Evidently, the plaintiffs were also fearful that the district court would find that Salomon was not a plan fiduciary, so they amended their second claim to cite Salomon for participating as a nonfiduciary party in interest in a transaction prohibited by § 1106.

Salomon moved for summary judgment on all three ERISA claims, and the plaintiffs moved for summary judgment on their § 1106 claim. As the plaintiffs had feared, Magistrate Judge Joan Humphrey Lefkow, sitting by consent of the parties, first determined that Salomon was not a plan fiduciary and found for Salomon on the first claim. As expected, she also found that the holding in *Continental Casualty* eliminated the third claim against Salomon for nonfiduciary participation in a fiduciary breach. Judge Lefkow denied summary judgment on the newly constituted § 1106 claim, however, finding that ERISA does provide a private cause of action against nonfiduciaries who participate in a prohibited transaction.

After the Supreme Court's decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), Salomon moved for reconsideration or, in the alternative, certification for interlocutory appeal on the sole remaining claim. In *Lockheed* the Supreme Court held that a § 1106 violation occurred only when a fiduciary had caused the plan to enter into the prohibited transaction. The district court declined to reconsider but granted certification for appeal of its denial of summary judgment. We review the denial of a motion for summary judgment *de novo*. *See Hillman v. Resolution Trust Corp.*, 66 F.3d 141, 143 (7th Cir. 1995).



In a part of ERISA titled "Fiduciary Responsibility" the nature of a fiduciary's relationship to a qualified employee benefit plan is spelled out in detail. Title 29 U.S.C. § 1104 defines the duty owed:

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and . . . with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

29 U.S.C. § 1104(a)(1). Section 1109 then makes a fiduciary personally liable for breaching this duty and describes the remedies available for a breach. Another part of the Act titled "Administration and Enforcement" provides a specific civil enforcement provision against fiduciaries who breach their duties—the Secretary of Labor, plan beneficiaries, and plan fiduciaries can sue fiduciaries for "appropriate relief under [§ 1109]." 29 U.S.C. § 1132(a)(2). ERISA also broadly allows the Secretary of Labor, plan fiduciaries, and plan beneficiaries to sue "to enjoin any act or practice which violates any provision of this title or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this title or the terms of the plan." 29 U.S.C. § 1132(a)(3). This last provision and the phrase "other appropriate equitable relief" has been the cause of much consternation in the courts.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Supreme Court considered a claim by plan beneficiaries against a nonfiduciary for knowingly participating in a fiduciary's breach of duty. The nonfiduciary defendant had acted as actuary for the Kaiser Steel Retirement Plan. When Kaiser began phasing out its steel operations a large number of employees took early retirement, and the defendant failed

to change the plan's actuarial assumptions to reflect the costs of the unusually large influx of retirees. As a result, Kaiser failed to adequately fund the plan. The plaintiffs brought their action under the "other appropriate equitable relief" clause of § 1132(a)(3). The *Mertens* parties and the lower courts all assumed that § 1132(a)(3) provided a cause of action against nonfiduciaries for knowingly participating in a fiduciary breach, and the only question raised before the Supreme Court was whether money damages could constitute "other appropriate equitable relief." *See Mertens*, 508 U.S. at 251. After extensive ruminations on the nature of equity, a 5-4 majority held that money damages could not be considered equitable relief for the purposes of § 1132(a)(3).

More importantly for our purposes, Justice Scalia, writing for the majority, made clear the Court's doubts that § 1132(a)(3) provides a cause of action against nonfiduciaries for participating in a fiduciary breach because "no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty." *Id.* at 254. There had been such a cause of action under the common law of trusts upon which ERISA was largely based. *See id.* Justice Scalia reasoned, however, that because Congress undoubtedly knew about the common law cause of action, it is all the more unlikely that the omission of an explicit cause of action in ERISA was inadvertent. *See id.* The "statute's . . . detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *See id.* (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985)). We adopted Justice Scalia's rationale as the law of this circuit in *Continental Casualty*, 33 F.3d at 757.

On appeal, the plaintiffs have wisely abandoned their claim against Salomon for participating in a breach of fiduciary duty under § 1104. Instead, they cite § 1106, which addresses "Transactions between plan and party in interest." In pertinent part, § 1106 provides:



> (a)(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> . . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

29 U.S.C. § 1106(a). Section 1106 prohibits plan fiduciaries from engaging in these transactions because they create a high potential for conflicts of interest. One example of a party in interest is "a person providing services to such plan." 29 U.S.C. § 1002(14)(B). For the purposes of our review we assume that at all relevant times Salomon was a party in interest vis á vis APT and that § 1106 therefore prohibited the sale of Salomon's motel property participation interests to APT (two points which Salomon reserves the right to dispute should this case go to trial). The plaintiffs argue that Salomon violated the Act by engaging in a transaction prohibited by § 1106. Therefore, the plaintiffs may seek "appropriate equitable relief," including monetary restitution, against Salomon under § 1132(a)(3).

Judge Lefkow agreed and held that § 1106 imposes a duty on nonfiduciary parties in interest to avoid prohibited transactions. This approach has found support in other circuits. *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413 (11th Cir. 1998); *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir. 1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994).

Our analysis begins, as it must, with the statutory language. The plaintiffs and the district court focused on the broad language of § 1132(a)(3) which allows plan fiduciaries like the plaintiffs to seek "other appropriate equitable relief" for any act which violates ERISA. The "act" alleged here is Salomon's participation in a transaction prohibited by § 1106. Therefore, if Salomon is indeed a party in interest and if it did participate in such a transaction, the plaintiffs can seek restitution for the plan's investment losses.

Salomon focuses instead on the language of § 1106 and its statutory context. Salomon points out that § 1106 by its terms only directly governs the conduct of fiduciaries ("a fiduciary . . . shall not cause . . ."), and therefore only a fiduciary can violate § 1106. Salomon's argument is strengthened when we consider the context of § 1106. Title 29 U.S.C. §§ 1101-1114 deal with "Fiduciary Responsibilities." Section 1104 describes the broad fiduciary standard of care that was required at common law, and § 1106 imposes a new statutory fiduciary duty—the duty not to cause the plan to enter into certain prohibited transactions. Section 1109 makes the fiduciary and only the fiduciary liable for breaches of the duties described in the "Fiduciary Responsibility" part of the Act. Finally, Section 1132(a)(2) provides a private right of action for appropriate relief under § 1109.

In *Mertens* Justice Scalia reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under § 1104 there was no such cause of action. The same logic applies to § 1106 because it simply describes another variety of fiduciary breach. Nothing explicitly makes nonfiduciaries liable for participating in a breach of that duty. The plaintiffs place great weight on the fact that § 1106 mentions "parties in interest," but the fact of the matter is that the section, by its plain terms, does not regulate their conduct. Therefore, § 1106 imposes no explicit duty on parties in interest. In *Continental Casualty* we adopted Justice Scalia's position



that where ERISA does not expressly impose a duty, there can be no cause of action. There seems to be no material distinction between that case and this.

In *Continental Casualty* the fiduciaries of a union pension fund obtained a one-year extension of their fiduciary liability insurance policy. The extension cost $750,000 and provided additional coverage of only $1 million. Entering into such a bad deal was a clear breach of fiduciary duty under § 1104. The Department of Labor sought relief for the plan against the fiduciaries under § 1109 and § 1132(a)(2). It also sought restitution from the insurance company which had participated in the fiduciaries' breach. The Labor Department argued that this was appropriate equitable relief under § 1132(a)(3). Relying on *Mertens*, we denied the claim against the insurance company because neither § 1104 nor § 1109 explicitly imposed liability on nonfiduciaries. Section 1132(a)(3) as a remedial statute only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act.

The same logic applies to this case. Section 1106 falls under the "Fiduciary Responsibility" part of the Act, and § 1109 makes fiduciaries liable for violating § 1106. The mere fact that § 1106 mentions "parties in interest" when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction.

The only viable distinction the plaintiffs raise between the position of participating parties in interest under § 1104 and participating parties in interest under § 1106 is that one of the Act's remedial provisions imposes civil penalties on parties in interest when they participate in a transaction prohibited by § 1106: "In the case of a transaction prohibited by section 406 [29 U.S.C. § 1106] by a party in interest with respect to a plan to which this part applies, the Secretary [of Labor] may assess a civil penalty against such party in interest." 29

U.S.C. § 1132(i). The fact that Congress saw fit to allow the Labor Department to impose such a penalty, however, only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking. Section 1132(i) allows the Labor Department to impose a civil penalty of up to 5 percent of the value of the transaction if the party in interest is willing to "correct" the transaction in a manner prescribed by the Department. If the party in interest refuses to correct the transaction, the penalty can be increased to 100 percent of the transaction amount. The Supreme Court in *Mertens* determined that Congress did not intend to impose civil liability on parties in interest for participating in a breach of fiduciary duty because ERISA does not contain an explicit statement of nonfiduciary participation liability. Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction. Section 1132(i) does provide a penalty against such parties in interest, but that penalty is imposed solely at the discretion of the Labor Department. If Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of cofiduciaries. *See* 29 U.S.C. § 1105.

The plaintiffs cite language in *Mertens* which they believe supports their position that parties in interest are liable for participation in prohibited transactions. In *Mertens* Justice Scalia suggested that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [§ 1106], and pay related civil penalties [under § 1132(i)] . . . and (assuming nonfiduciaries can be sued under [§ 1132(a)(3)]) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees." *Mertens*, 508 U.S. 248, 262. This language, however, does not get the plaintiffs as far as they would like. First, the statement that professional



service providers like Salomon must disgorge assets and profits gained from a § 1106 transaction is unremarkable. As discussed above, § 1132(i) forces parties in interest to correct such transactions at peril of a Labor Department penalty.

Second, Justice Scalia's remark that "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" must be understood in the context of the unique posture of the case the Supreme Court had before it. The parties and lower courts in *Mertens* had all assumed that § 1132(a)(3) provided relief against nonfiduciaries for participation in a fiduciary breach. Therefore, the Supreme Court was asked to determine only whether damages could be considered "appropriate equitable relief." A majority of the Court, however, expresses strong doubts as to whether there even was a cause of action under § 1132(a)(3) against nonfiduciaries. *See Mertens*, 508 U.S. at 254-55. The Court then proceeded to decide the issue of whether damages could be equitable, technically leaving open the issue of whether § 1132(a)(3) provided a cause of action against nonfiduciaries. Thus, the parenthetical phrase "assuming nonfiduciaries can be sued under [§ 1132(a)(3)]" was stating a big assumption—an assumption Justice Scalia had previously made clear that he and a majority of the Court were unwilling to make. Justice Scalia's reasoning is now the law of this circuit, and the "assuming" language can no longer support the plaintiffs' reading of the statute.

Both parties also cite the more recent Supreme Court decision in *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996), to support their respective positions. Salomon cites the case for the proposition that only fiduciaries can be held liable under § 1106. In *Lockheed* the plaintiff beneficiary sued his employer, the plan sponsor, for engaging in a transaction prohibited by § 1106. The Ninth Circuit held that the plan sponsor in this case was not a fiduciary but was still liable as a party in interest under § 1106. The Supreme Court reversed. Justice Thomas, writing for a unanimous Court, held that proof that a fiduciary caused the plan to enter into

the prohibited transaction was a necessary predicate to § 1106 liability. *See id.* at 891. Once the Court had determined that the defendant sponsor was not a fiduciary, there was no other potential fiduciary to cause the transaction. However, Justice Thomas also seemed to leave open the possibility that a nonfiduciary party in interest could be held liable for a prohibited transaction if a fiduciary caused the plan to enter into the transaction:

> The Court of Appeals thus was not necessarily wrong in saying that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA"; but the only transactions rendered impermissible by [§ 1106] are transactions caused by fiduciaries.

*See id.* at 889 n.3. The plaintiffs seize on this rationale to support their argument that nonfiduciaries are liable under § 1106, but the opinion really provides no guidance one way or the other. "Not necessarily wrong" does not mean "right." Furthermore, Justice Thomas went out of his way to point out that the passages from *Mertens* that the Ninth Circuit relied on in finding that "a party in interest who benefitted from an impermissible transaction can be held liable under ERISA" were dicta. *See id.* At most, the "not necessarily wrong" statement makes it clear that in *Lockheed* the Court was once again not addressing the issue of party-in-interest liability under § 1106. Such liability was still an open question after *Lockheed* as far as the Supreme Court was concerned.

The plaintiffs also find support for their reading of § 1106 in ERISA's legislative history. A Congressional Conference Committee Report suggests that § 1106 would prohibit "plan fiduciaries and parties in interest" from engaging in the listed transactions, implying that both parties to the transaction would be liable. H.R. Conf. Rep. No. 1280, 93rd Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4639, 5087. But Salomon's analysis of the legislative history is more



convincing. The Senate and the House of Representatives both passed versions of ERISA. The House bill did not explicitly impose liability on nonfiduciaries; the Senate bill did:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay the fund any profits realized by him from such transaction.

H.R. 2, 93rd Cong., 2d Sess. § 511 (adding § 15(i)), 693 (as passed by the Senate on Mar. 4, 1974) (not enacted), reprinted in Legislative History of the Employee Retirement Income Security Act of 1974, Vol. 3, at 3599, 3780 (1976). The Conference Committee staff charged with reconciling the House and Senate versions specifically recommended dropping the party in interest liability provision. Summary of Differences Between the Senate Version and the House Version of H.R. 2—To Provide for Pension Reform, committee prints prepared for the use of the Senate and House conferees on H.R. 2, Committee Print No. 1, Pt. 3, p. 9, 93rd Cong. Sess. (1974), *id.* at 5259. And Congress did so when it passed the final bill into law. While we hesitate to give too much weight to legislative history, this record suggests that Congress specifically considered imposing civil liability on parties in interest for participating in impermissible transactions, then elected not to do so.

Whether there is a private cause of action against nonfiduciary parties in interest under § 1106 is a difficult issue. As we have noted, at least three other circuits have found such a cause of action. Ultimately, the dicta in *Mertens* adopted by this court in *Continental Casualty* provides the most guidance. Applying Justice Scalia's rationale to § 1106, we do not think it imposes liability on nonfiduciary parties in inter-

est any more than § 1104 does. Like § 1104, § 1106 comes under the heading "Fiduciary Responsibility."

The plaintiffs argue that because it is entitled "Prohibited Transactions" § 1106 regulates the conduct of all parties to the transaction. The prohibitory language of the section itself is clear, however: "*fiduciaries* shall not . . . ." Causing a qualified plan to engage in one of these transactions is simply another species of fiduciary breach. A nonfiduciary cannot violate § 1106 and therefore cannot be liable under § 1132(a)(3) for participating in a § 1106 transaction. Section 1132(i) provides the only express penalty against nonfiduciary parties in interest who participate in a fiduciary's breach of his or her responsibility under § 1106. The Supreme Court has repeatedly stated its reluctance to infer ERISA causes of action where the statute does not expressly provide for them, and we decline to do so here.

With all due respect to the circuits[1] who have considered this issue, we find no convincing reason to distinguish § 1106 from § 1104 for the purposes of nonfiduciary liability. The decision of the district court is therefore reversed and summary judgment is granted to Salomon Brothers.

---

[1] Because this opinion creates a circuit split, it has been circulated among all judges of the court in regular active service as required by Seventh Circuit Rule 40(e). Judge Coffey did not participate in the circulation due to a conflict. All other judges voted not to rehear the case en banc except Judge Ripple who voted to grant rehearing en banc.

Feb 22 2000

(6)

No. 99-579

Supreme Court, U.S.
FILED

FEB 22 2000

IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR THE PETITIONERS


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February 2000

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## QUESTION PRESENTED

Whether a non-fiduciary party in interest with respect to an employee benefit plan that engages in a prohibited transaction, as defined in § 406(a)(1) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106(a)(1), with the plan can be sued under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for "appropriate equitable relief," including restitution.

## PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS AND RULE 29.6 STATEMENT

The Petitioners in this case are Harris Trust and Savings Bank, not individually but solely as Trustee for the Ameritech Pension Trust, and Ameritech Corporation. Petitioners were plaintiffs in the district court and appellees in the court of appeals.

Respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. were defendants in the district court and appellants in the court of appeals.

There were no other parties in the court of appeals.

Petitioner Harris Trust and Savings Bank is wholly owned by Harris Bankcorp Inc., which is in turn wholly owned by Bankmont Financial Corp., which is in turn wholly owned by Bank of Montreal, whose stock is publicly traded.

Petitioner Ameritech Corporation is a wholly-owned subsidiary of SBC Communications Inc., whose stock is publicly traded.



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# BRIEF FOR THE PETITIONERS

## OPINIONS BELOW

The opinion of the court of appeals, J.A. 342-354, is reported at 184 F.3d 646. The memorandum decision of the district court, J.A. 283-324, as modified, J.A. 325, is not reported. The opinions of the district court denying reconsideration, J.A. 326-330, and certifying the question presented for interlocutory appeal to the court of appeals, J.A. 338-341, are also unreported.

## JURISDICTION

The judgment of the court of appeals was entered on July 6, 1999. J.A. 342. The petition for a writ of certiorari was filed on October 4, 1999, and was granted on January 7, 2000. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(l).

## STATUTES INVOLVED

Relevant provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"), 88 Stat. 829 (1974), codified as amended at 29 U.S.C. § 1001 *et seq.*, are reproduced at Pet. App. 66a-77a and J.A. 234-273.

## STATEMENT

### A. Statutory Background

**1. ERISA.** "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) (quoting *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)). "Congress enacted ERISA after 'almost a decade of studying the Nation's private pension plans' and other employee benefit plans." *Central States, Southeast & Southwest Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559, 569

(1985) (quoting *Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361 (1980)). "Congress found that there had been a 'rapid and substantial' growth in the 'size, scope and numbers' of employee benefit plans and that 'the continued well-being and security of millions of employees and their dependents are directly affected by these plans.'" *Central States*, 472 U.S. at 569 (quoting ERISA § 2, 29 U.S.C. § 1001(a)).[1]

"The principal object of [ERISA] is to protect plan participants and beneficiaries." *Boggs v. Boggs*, 520 U.S. 833, 845 (1997) (citing *Shaw*, 463 U.S. at 90). To achieve this goal, "Congress included [in ERISA] various safeguards to preclude abuse and to completely secure the rights and expectations brought into being by this landmark reform legislation." *Ingersoll-Rand*, 498 U.S. at 137 (internal quotation and citation omitted). ERISA "tries to 'make as certain as possible that pension fund assets [will] be adequate' to meet expected benefits payments." *Lockheed Corp. v. Spink*, 517 U.S. 882, 887 (1996) (quoting *Nachman*, 446 U.S. at 375).

ERISA's civil enforcement provisions, found in Section 502(a) of the statute, 29 U.S.C. § 1132(a), are "one of the essential tools for accomplishing the stated purposes of ERISA." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 52 (1987). In Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), Congress provided:

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[1] In this brief, references to provisions of Title I of ERISA are generally to the relevant section of ERISA (*e.g.*, "ERISA § 406") with a parallel citation to Title 29 of the U.S. Code (*e.g.*, 29 U.S.C. § 1106). References to provisions of Title II of ERISA (which amended provisions of the Internal Revenue Code) are generally to the relevant section of Title 26 of the U.S. Code (*e.g.*, 26 U.S.C. § 4975).



> A civil action may be brought – by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

In Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), Congress used identical language to authorize the Secretary of Labor to bring civil actions "to enjoin any act or practice which violates any provision of this title," or "to obtain other appropriate equitable relief."[2] Section 502(a)(3) and (a)(5) are "catchall" provisions designed to act as a "safety net" to ensure that appropriate equitable relief is available for all violations of ERISA. *Varity Corp. v. Howe*, 516 U.S. 489, 512 (1996).

**2. Prohibited Transactions and Parties in Interest.** One of the ways in which ERISA protects plan assets is by prohibiting transactions that Congress viewed as likely to threaten plan assets and beneficiaries. As this Court has explained:

> Before ERISA's enactment in 1974, the measure that governed a transaction between a pension plan and its sponsor was the customary arm's-length standard of conduct. This provided an open door for abuses such as the sponsor's sale of property to the plan at an inflated price or the sponsor's satisfaction of a funding obligation by contribution of property that was overvalued or nonliquid.

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[2] "[T]his title" refers to Title I of ERISA, §§ 1-734, 29 U.S.C. §§ 1001-1191c.

*Commissioner of Internal Revenue v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). To address such abuses, Congress broadly prohibited various types of transactions between plans and "parties in interest," without regard to whether the terms of the transactions were arm's-length. *See* ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1).[3] In enacting the prohibited transaction provisions, "Congress' goal was to bar categorically a transaction that was likely to injure the [employee benefit] plan." *Keystone*, 508 U.S. at 160.

ERISA defines a "party in interest" with respect to an employee benefit plan to include, among other persons, any fiduciary of the plan, any "person providing services to" the plan, an employer whose employees are covered by the plan, an employee organization whose members are covered by the plan, and certain relatives of parties in interest. ERISA § 3(14), 29 U.S.C. § 1002(14).[4] Congress provided for

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[3] Section 406(a)(1) provides that prohibited transactions include a "direct or indirect –

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;
(B) lending of money or other extension of credit between the plan and a party in interest;
(C) furnishing of goods, services, or facilities between the plan and a party in interest;
(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 407(a) [29 U.S.C. § 1107a]."

ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1).

[4] The term "party in interest" thus includes all fiduciaries with respect to a plan, as well as certain non-fiduciaries. ERISA defines a "fiduciary" with respect to a plan as a person who (among other things) "exercises any discretionary authority or discretionary control respecting management of such plan or exercises any

(...footnote continued)



specific statutory and administrative exemptions to the broad prohibitions of ERISA § 406. *See* ERISA § 408, 29 U.S.C. § 1108. Parties in interest who engage in prohibited transactions with a plan may be subject to civil penalties. ERISA § 502(i), (*l*) 29 U.S.C. § 1132(i), (*l*).

**3. Prohibited Transactions Under the Internal Revenue Code.** Internal Revenue Code § 4975 (originally enacted as part of Title II of ERISA) imposes a two-tier excise tax on "disqualified persons" who engage in "prohibited transactions" involving tax-qualified plans, individual retirement accounts and annuities, medical savings accounts, and education individual retirement accounts. *See* 26 U.S.C. § 4975(a), (b), (e)(1). The definition of "disqualified person" in § 4975 is similar (although not identical) to the definition of "party in interest" in ERISA § 3(14). *See id.* § 4975(e)(2). Likewise, the definition of "prohibited transaction" under § 4975 is similar (but not identical) to the definition in ERISA § 406. *See id.* § 4975(c). Section 4975 contains exemptions similar to those in ERISA § 408. *See id.* § 4975(d).

Congress initially set the first-tier excise tax at 5 percent of the amount involved with respect to the prohibited transaction. In 1996, it raised the first-tier tax to 10 percent; in 1997, it raised the first-tier tax again to 15 percent. *See id.* § 4975(a). The first-tier tax applies to each full or partial year in the "taxable period," which begins when the prohibited transaction occurs and ends not later than when the prohibited transaction is corrected. *Id.* § 4975(a) & (f)(2). Thus, depending on the year in which the transaction

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(. . . continued)
authority or control respecting management or disposition of its assets." ERISA § 3(21), 29 U.S.C. § 1002(21).

occurred, the first-tier tax ranges from 5 percent to 15 percent per year.

If the prohibited transaction is not "corrected within the taxable period," a second-tier tax of 100 percent of the amount involved is imposed. *Id.* § 4975(b). A "correction" is defined as "undoing the [prohibited] transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." *Id.* § 4975(f)(5). Both taxes are imposed on "any disqualified person who participate[d] in the prohibited transaction (other than a fiduciary acting only as such)." *Id.* § 4975(a), (b).

Section 4975(h) provides that "[b]efore sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." *Id.* § 4975(h).

**B. The Facts Underlying This Case**

Petitioner Ameritech Corporation is the plan sponsor and plan administrator of pension plans for employees and retirees of Ameritech and its affiliates and subsidiaries.[5] At all relevant times, Petitioner Harris Trust and Savings Bank was the Trustee for the Ameritech Pension Trust, through which plans with some 118,000 participants and beneficiaries are funded. Ameritech, as plan administrator, and Harris

[5] Some of the facts set forth herein are contested by Salomon. Because of the course that proceedings took below, the lower courts did not resolve such factual disputes, but instead resolved the question of law presented here on the assumption that Ameritech's factual allegations are correct.



Trust, as trustee, were plan fiduciaries as defined in ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A). J.A. 236.

Respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. (collectively "Salomon") were service providers to the plans. *Id.* 343. Salomon received hundreds of thousands of dollars per year in commissions and other compensation for securities brokerage and other services provided to the plans during the relevant years. C.A. Supp. App. 91-92, 419-56. As provider of these services, Salomon was a "party in interest" with respect to the plans within the meaning of ERISA § 3(14), 29 U.S.C. § 1002(14). The district court found, however, that Salomon was not, by virtue of its provision of these services or of investment advice to the plans, a fiduciary of the plans. J.A. 289-299.

Between 1987 and 1989, Salomon acted as placement agent for three issuances of mortgage notes by Motels of America, Inc., and one issuance of mortgage notes by Best Inns, Inc. In connection with each of these transactions, Salomon entered into a "Fee Agreement" with the issuer, under which, as consideration for its services, Salomon became entitled to fees based on a percentage of any "net cash flow" generated by the motels involved, plus a percentage of any appreciation of the motel properties upon maturity of the associated notes or sale of the properties. *Id.* 342-343.

Between 1987 and 1989, Salomon sold a 100 percent interest in one of the Fee Agreements and 95 percent interests in the other three Fee Agreements to the Ameritech Pension Trust for nearly $21 million. *Id.* 287. The purchases were directed by National Investment Services of America ("NISA"), an investment manager to which Ameritech had delegated investment discretion over a portion of the Trust's assets. J.A. 311; C.A. Supp. App. 105-06. By virtue of its discretion over investment of plan assets, NISA was a plan fiduciary within the meaning of ERISA § 3(21)(A), 29

U.S.C. § 1002(21)(A). *See also* ERISA §§ 3(38), 402(c)(3), 29 U.S.C. §§ 1002(38), 1102(c)(3). Petitioners maintain that the Fee Agreement sales were prohibited transactions and did not qualify for any of the statutory or regulatory exemptions from prohibited transaction status. J.A. 299-300, 313.

Salomon failed to make timely disclosure of information it had as to the extreme riskiness, poor performance, and low value of the Fee Agreements. *Id.* 288. Two senior employees of Motels of America testified that the Fee Agreements were so risky and of such low value that "it was kind of like selling air." *Id.* 84; *see also id.* 131 ("they bought air").[6]

The Fee Agreements proved to be nearly worthless. *Id.* 288. Both issuers went into bankruptcy. After taking all reasonable steps to mitigate its losses, the Ameritech Pension Trust lost $19,889,602 of the $20,915,000 it paid for these investments. C.A. Supp. App. 170, 177, 180. Salomon, which had a basis of zero in the Fee Agreements, reaped a profit of $20,915,000 from selling them to the Trust. C.A. Supp. App. 105, 127-29, 393-95. An internal Salomon document describes one of the transactions as "an extraordinary sales achievement and profit to [Salomon] as a result of [a Salomon employee's] relationship with his account and his desire to focus on our priorities." J.A. 190.

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[6] The record contains parol evidence that Salomon agreed to monitor the performance of the Fee Agreements. *E.g.*, J.A. 57-61. The district court held (in a ruling not yet subject to appeal) that such evidence is inadmissible to show that Salomon was a fiduciary with respect to the plans. *Id.* 295-299. But the district court recognized that the evidence is admissible for other purposes, such as to show fraud. *Id.* 298-299.



### C. Proceedings in the District Court

Petitioners filed suit against Salomon in 1992, asserting claims under ERISA, the Racketeer Influenced and Corrupt Organizations Act, and state law. Count II of the Second Amended Complaint asserts that, in selling the Fee Agreements to the Pension Trust, Salomon, a party in interest with respect to the plans, participated in a prohibited transaction under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), and is liable to provide restitution under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). *Id.* 39-42.

Salomon moved for summary judgment on Count II, contending that only fiduciaries that cause plans to enter into prohibited transactions, and not non-fiduciary parties in interest that participate in such transactions, can be liable under § 502(a)(3) to provide appropriate equitable relief with regard to such transactions.

The district court denied the motion. *Id.* 299-310. The court addressed "two closely related but distinct issues: whether it is a violation of ERISA for a nonfiduciary party in interest to engage in a [Section 406(a)] prohibited transaction and, if yes, whether ERISA affirmatively authorizes plaintiffs to bring suit to redress such a violation." *Id.* 300-301. The court answered both questions in the affirmative.

In analyzing the first question, the district court observed that this Court, in *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), contrasted the absence of any provision in ERISA requiring a non-fiduciary to avoid participating in a fiduciary's violation of a fiduciary obligation with "other provisions which . . . can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in [Section 406(a)] transactions." J.A. 302. Indeed, the district court noted, "Salomon seems to accept *Mertens'* belief that [Section 406(a)] can be read as imposing obligations on nonfiduciary parties in interest." *Id.* The court observed that several courts of appeals have "acknowledged the

significance of this distinction and have concluded that parties in interest are obligated to avoid the transactions prohibited in § 1106(a)." *Id.* (citing *Reich v. Stangl*, 73 F.3d 1027, 1032 (10th Cir.), *cert. denied*, 519 U.S. 807 (1996); *Landwehr v. Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich v. Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich v. Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994)). The district court pointed to statements in the legislative history of ERISA in support of its conclusion. *Id.* 303. In addition, the court commented that "if there were no duty to avoid such transactions, one might wonder whether there is any basis for imposing administrative penalties against parties in interest." *Id.* 304 n.13. The court concluded that "[p]arties in interest, even if not fiduciaries of a plan, have a duty under [§ 406(a)] to avoid the transactions identified therein." *Id.* 304.

In addressing the second question – whether ERISA authorizes a private cause of action to recover against non-fiduciary parties in interest who violate ERISA § 406(a) – the court observed that "[t]he language of [§ 502(a)(3)] is plainly broad enough to constitute the needed 'affirmative authorization.'" *Id.* 305. Under the terms of Section 502(a)(3), "plaintiffs are entitled to bring an equitable action to redress any violation of ERISA or to enforce the terms of the statute." *Id.* The court noted that its conclusion accords with *Mertens*, which stated that "[p]rofessional service providers . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by [ERISA § 406], and pay related civil penalties [under ERISA § 502(i)]." *Id.* 306 (quoting *Mertens*, 508 U.S. at 262).

The court rejected, as contrary to the language and purposes of ERISA, Salomon's argument that administrative penalties and excise taxes are the exclusive remedies available against parties in interest who engage in prohibited transactions. The court observed that administrative penalties and excise taxes "would provide little, if any,



protection for the interests of the plan participants," and that "limiting the potential defendants to only one of two parties to the transaction . . . would render the available relief wholly inadequate." *Id.* 307-308 (citing *Landwehr*, 72 F.3d at 734, in turn citing *Nieto v. Ecker*, 845 F.2d 868, 874 (1998)).

Subsequently, the district court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) the question whether a non-fiduciary party in interest who engages in a prohibited transaction with a plan may be sued for appropriate equitable relief under ERISA § 502(a)(3). *Id.* 338-341.

**D. Proceedings in the Court of Appeals**

The court of appeals reversed. *Id.* 342-354. While recognizing that every other circuit to address the issue has agreed with the district court, the court of appeals nevertheless held that "[a] nonfiduciary cannot violate [ERISA § 406] and therefore cannot be liable under [§ 502(a)(3)] for participating in a [§ 406] transaction." *Id.* 354.

In the court of appeals' view, § 406 "imposes no explicit duty on parties in interest." *Id.* 348. In an earlier case, the court of appeals adopted the position, based on its understanding of this Court's *dicta* in *Mertens*, "that where ERISA does not expressly impose a duty, there can be no cause of action." *Id.* 348-349. The court of appeals saw "no material distinction between that case and this." *Id.* 349. The court concluded that "[t]he mere fact that [§ 406] mentions 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction." *Id.*

The court of appeals recognized that *Mertens* acknowledged one "viable distinction . . . between the position of participating parties in interest under [§ 404] and

participating parties in interest under [§ 406]," namely, "that one of the Act's remedial provisions imposes civil penalties on parties in interest when they participate in a transaction prohibited by [§ 406]." *Id.* 349-350 (citing ERISA § 502(i), 29 U.S.C. § 1132(i)). But the court of appeals concluded that "[i]f Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly." *Id.* 350.

Although the court of appeals "hesitate[d] to give too much weight to legislative history," it nevertheless found support for its interpretation in the legislative history of ERISA. The court of appeals acknowledged that the ERISA Conference Committee Report states that ERISA prohibits "'plan fiduciaries and parties in interest' from engaging in the listed transactions," and that this statement implies "that both parties to the transaction would be liable." *Id.* 352 (quoting H.R. Conf. Rep. No. 93-1280, at 306 (1974), *reprinted in* 3 Staff of Sen. Subcomm. on Labor, Comm. on Labor & Public Welfare, 94th Cong., 2d Sess., Legislative History of the Employee Retirement Income Security Act of 1974 4573 (Comm. Print 1976) (hereinafter "Leg. Hist."). But the court of appeals noted that the version of ERISA originally passed by the Senate included language that explicitly imposed liability on non-fiduciaries, and that the final version of ERISA did not include this language. The court inferred that Congress considered imposing civil liability on parties in interest for engaging in prohibited transactions, but decided not to do so.

The court of appeals ended its opinion by acknowledging that "[w]hether there is a private cause of action against nonfiduciary parties in interest under [§ 406] is a difficult issue." *Id.* 353. The court concluded that "[u]ltimately, the dicta in *Mertens* . . . provide[ ] the most guidance," and held that non-fiduciary parties in interest who engage in prohibited transactions are not subject to suit.



## SUMMARY OF ARGUMENT

I. ERISA provides that "[a] civil action may be brought . . . to enjoin any act or practice which violates any provision of this title . . . or to obtain other appropriate equitable relief. . . to redress such violation." ERISA § 502(a)(3) & (a)(5), 29 U.S.C. § 1132(a)(3) & (a)(5). The statutory language refers to "any act or practice which violates" ERISA, rather than to "any person who violates ERISA."

The court of appeals erred in holding that ERISA Section 406(a), 29 U.S.C. § 1106(a), applies only to fiduciaries that cause a plan to engage in a prohibited transaction. As the title of § 406 indicates, Congress intended to bar *transactions* between plans and parties in interest. Several related statutory provisions confirm that Congress intended the prohibitions of § 406(a) to apply to non-fiduciary parties in interest.

In any event, the availability of "appropriate equitable relief" against non-fiduciary parties in interest who engage in prohibited transactions does not depend on whether the non-fiduciary party in interest has itself violated Section 406(a). It is undisputed that a fiduciary that causes a plan to engage in a prohibited transaction violates Section 406(a). Under well-established equitable principles, restitution is available against a party in interest who comes into possession of plan assets as a result of an ERISA violation without regard to whether the party in interest has itself violated the statute. The relevant question is not whether the defendant is a wrongdoer, but whether the defendant would be unjustly enriched by retaining the assets.

The statutory language thus provides a clear answer to the question presented in this case. Even if the language were ambiguous, however, deference would be due to the Secretary of Labor's consistent view that actions for equitable relief are available against non-fiduciary parties in interest.

II. ERISA's principal purpose – protection of plan participants and beneficiaries – is furthered by interpreting ERISA to authorize actions to recover plan assets transferred in prohibited transactions. If such actions are not available, it will often be difficult or impossible to undo a prohibited transaction. ERISA § 502(i) and 26 U.S.C. § 4975 provide insufficient protection for plan assets. A fiduciary who causes a plan to enter into a prohibited transaction typically is not in possession of plan assets transferred to the party in interest, and may not have sufficient assets of its own to make up the loss to the plan. Furthermore, state law claims against non-fiduciaries may well be barred by ERISA's powerful preemption clause. Consequently, if plan participants and beneficiaries lack a remedy against non-fiduciary parties in interest under § 502(a)(3), they may be left with no effective means of recovering plan assets.

III. The legislative history of ERISA is consistent with the statutory text. The Conference Report states that ERISA § 406 prohibits both plan fiduciaries and parties in interest from engaging in prohibited transactions. The version of ERISA originally enacted by the Senate explicitly imposed liability on non-fiduciaries, while the House version provided a more limited range of civil remedies. Although the final version of ERISA did not include the specific language from the Senate bill, it broadened the House version by authorizing actions for "appropriate equitable relief" to redress any violation of Title I of ERISA.

IV. This Court's decisions in *Mertens* and *Lockheed* are consistent with the conclusion that equitable relief is available under § 502(a)(3) and (a)(5) against a non-fiduciary party in interest that engages in a prohibited transaction. *Mertens* holds that a damages award (unlike a restitution order requiring the defendant to return plan assets and profits) is not "appropriate equitable relief" under Section 502(a)(3) or (a)(5). In *dicta*, the Court expressed doubt that ERISA authorizes actions against non-fiduciaries that assist a



fiduciary in violating a fiduciary obligation. But the Court took pains to distinguish non-fiduciaries who assist in violating fiduciary duties from parties in interest who engage in prohibited transactions with a plan. Moreover, the Court's opinion in *Lockheed* expressly reconciles the decision in that case with decisions upholding party-in-interest liability.

## ARGUMENT

### I. ERISA AUTHORIZES CIVIL ACTIONS SEEKING RESTITUTION FROM NON-FIDUCIARY PARTIES IN INTEREST THAT ENGAGE IN PROHIBITED TRANSACTIONS WITH A PLAN.

When confronted with a question of statutory interpretation, this Court "examine[s] first the language of the governing statute." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 94 (1993). The Court's examination is "guided not by 'a single sentence or member of a sentence, but look[s] to the provisions of the whole law, and to its object and policy.'" *Id.* at 94-95 (quoting *Pilot Life Ins. Co.*, 481 U.S. at 51, in turn quoting *Kelly v. Robinson*, 479 U.S. 36, 43 (1986) (internal quotation marks omitted)). In this case, examination of the statutory language leads to the conclusion that ERISA authorizes civil actions seeking equitable relief, including restitution of plan assets, from non-fiduciary parties in interest that engage in prohibited transactions with a plan.

#### A. ERISA Authorizes Actions Seeking "Appropriate Equitable Relief" For "Any Act Or Practice Which Violates Any Provision Of" Title I.

Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), provides:

> A civil action may be brought – by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate

> equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

Section 502(a)(5) of ERISA, 29 U.S.C. § 1132(a)(5), uses identical language to authorize the Secretary of Labor to bring civil actions "to enjoin any act or practice which violates any provision of this title," or "to obtain other appropriate equitable relief." Since the language of Subsections (3) and (5) is the same, those provisions should be interpreted to have the same meaning. *See Mertens*, 508 U.S. at 260 ("[L]anguage used in one portion of a statute (§ 502(a)(3)) should be deemed to have the same meaning as the same language used elsewhere in the statute (§ 502(a)(5))."); *see also Varity Corp.*, 516 U.S. at 510 ("Subsection (5) is identical to subsection (3), except that it authorizes suits by the Secretary, rather than the participants and beneficiaries.").

The language of Subsections (3) and (5) is strikingly broad. Congress authorized civil actions to remedy "*any* act or practice which violates *any* provision of this title." (Emphasis added). As this Court has recognized, Subsections (3) and (5) are "catchall" provisions." *Varity Corp.*, 516 U.S. at 512. The broad scope of Subsections (3) and (5) follows not only from their language but also from "§ 502's overall structure." *Id.*

> Four of [Section 502(a)'s then] six subsections focus upon specific areas, *i.e.*, the first (wrongful denial of benefits and information), the second (fiduciary obligations related to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties). The language of the other two subsections, the third and the fifth, creates two "catchalls," providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that these "catchall" provisions act as a safety net, offering appropriate



> equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy.

*Id.*[7]

Two aspects of the language of Subsections (3) and (5) are especially pertinent to the issue presented in this case. First, Congress authorized civil actions to remedy "*any act or practice* which violates any provision of this title." (Emphasis added.) Congress did not limit the scope of Subsections (3) and (5) by authorizing civil actions only against "any fiduciary who violates any provision of this title," or even against "any person who violates any provision of this title." Instead, Subsections (3) and (5) authorize actions for equitable relief to redress violations of ERISA "without restricting the types of parties who may be so sued." *Useden v. Acker*, 947 F.2d 1563, 1581 (11th Cir. 1991), *cert. denied*, 508 U.S. 959 (1993).[8]

A second aspect of the statutory language confirms that Congress's reference to "any act or practice which violates any provision of this title," rather than to "any person who

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[7] *Varity*'s broad interpretation of Subsections (3) and (5) is consistent with the legislative history of ERISA. *See* 516 U.S. at 512 (citing S. Rep. No. 93-127, at 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17 (1973), 2 Leg. Hist. 2364 (describing House version in identical terms)); *see also infra* pages 39-44 (discussing ERISA's legislative history).

[8] Subsections (3) and (5) specifically restrict the types of *plaintiffs* entitled to bring a civil action. Congress did not use similar language to restrict the types of defendants who may be sued. Moreover, limiting relief to "any fiduciary that violates any provision of this title" would render Subsections (3) and (5) superfluous, since Subsection (2) already authorizes such relief. *See* ERISA §§ 409, 502(a)(2), 29 U.S.C. §§ 1109, 1132(a)(2).

violates any provision of this title," was not a casual oversight. Subsections (3) and (5) authorize courts to award "*appropriate equitable relief*" to redress any act or practice that violates a provision of ERISA Title I. (Emphasis added.) This statutory language incorporates a body of pre-ERISA law concerning equitable remedies. As explained below (*see* pages 28-31), appropriate equitable relief includes remedies (such as restitution pursuant to a constructive trust) that are not limited to wrongdoers, but instead reach all persons who would be unjustly enriched by retaining plan assets. Thus, Congress's reference to "appropriate equitable relief" dovetails with its reference to "any act or practice which violates" ERISA, and reinforces the conclusion that Congress did not restrict actions under Subsections (3) and (5) to persons who violate ERISA.[9]

It is undisputed that Petitioners are fiduciaries within the meaning of ERISA, *see* J.A. 285, and therefore may bring a civil action under Subsection (3) for "appropriate equitable relief" to redress "any act or practice which violates any provision of" ERISA Title I. The decisive issues in this case are therefore: (1) whether Petitioners are seeking to redress "any act or practice which violates any provision of" Title I; and (2) if so, whether Petitioners are seeking "appropriate equitable relief" to redress the violation. As explained below, the answer to both these questions is clearly "yes." A prohibited transaction between a plan and a party in interest is an "act or practice" that violates § 406(a) of ERISA, 29 U.S.C. § 1106(a). *See infra* pages 19-27. And the "equitable relief" awardable under Subsections (3) and (5) includes

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[9] The statutory text is reinforced by ERISA's legislative history, which states that "appropriate equitable relief" includes "a constructive trust . . . imposed on the plan assets, if needed to protect the participants and beneficiaries." S. Rep. No. 93-383, at 105 (1973), 1 Leg. Hist. 1173.



restitution of plan assets and profits. *Mertens*, 508 U.S. at 260; *see infra* pages 28-31.

### B. A Prohibited Transaction Between A Plan And A Party In Interest Is An "Act or Practice" That Violates Section 406(a).

Section 406 of ERISA, 29 U.S.C. § 1106, entitled "Prohibited transactions," contains § 406(a), entitled "Transactions between plan and party in interest," which provides, in part:

> A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect –
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> . . .
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1). In interpreting this statutory language, the court of appeals focused on whether § 406(a) is addressed solely to fiduciaries that cause plans to enter into prohibited transactions with a party in interest. *See* J.A. 349. If (as most courts of appeals have held) § 406(a) prohibits *transactions* between a plan and a party in interest, then a party in interest who engages in such a transaction violates § 406(a) (a provision of ERISA Title I), and therefore is subject to an action for appropriate equitable relief under § 502(a)(3) and (a)(5). In this case, however, the court of appeals read § 406(a) as merely prohibiting fiduciaries from *causing* plans to engage in transactions with parties in interest. If a non-fiduciary party in interest cannot violate § 406(a), the court reasoned, it cannot be sued for equitable relief under § 502(a)(3) or (a)(5).

The court of appeals' conclusion does not follow from its premise. Even if § 406(a) applied only to fiduciaries, it would not follow that relief is unavailable under § 502(a)(3) and (a)(5) against non-fiduciary parties in interest. When a fiduciary causes a plan to engage in a prohibited transaction with a party in interest, there is plainly an "act or practice which violates" § 406(a), even if the party in interest itself does not violate § 406(a). As explained below (*see* pages 28-31), "appropriate equitable relief' for such a violation includes a restitutionary order requiring the party in interest to disgorge the plan's assets even if the party in interest did not violate any provision of ERISA. Consequently, the answer to the question presented in this case does not ultimately depend on whether a non-fiduciary party in interest who engages in a prohibited transaction with a plan violates § 406(a).

Moreover, the court of appeals' premise is incorrect: § 406(a) does not pertain solely to fiduciaries. The court of appeals relied primarily on the opening clause of § 406: "A fiduciary . . . shall not cause the plan to engage in a [prohibited] transaction . . . ." Because § 406(a) does not contain a similar clause explicitly directing parties in interest not to engage in prohibited transactions, the court concluded that it is addressed solely to fiduciaries. J.A. 348-49.

The court of appeals focused on "a single . . . member of a sentence," rather than "look[ing] to the provisions of the whole law." *Pilot Life Ins. Co.*, 481 U.S. at 51 (additional citations and quotation marks omitted). When Section 406(a) is read as a whole, and in conjunction with other provisions of ERISA, it is clear that Congress intended to prohibit *transactions* between plans and parties in interest, and that the prohibitions of Section 406(a) apply to parties in interest who engage in such transactions as well as to fiduciaries who cause plans to engage in them.



The text of Section 406(a) does not compel the conclusion that it is addressed solely to fiduciaries. The court of appeals' interpretation rests on an inference (Congress expressly prohibited fiduciaries from causing plans to engage in prohibited transactions; it did not expressly prohibit non-fiduciary parties in interest from engaging in such transactions; therefore, Congress did not intend to prohibit non-fiduciary parties in interest from engaging in such transactions). Such an inference may, of course, be overcome by textual evidence of a contrary legislative intent.

As other courts of appeals have recognized, when a fiduciary causes a plan to engage in a prohibited transaction with a party in interest, the party in interest is an essential party to the violation of § 406(a).[10] As the headings of § 406 and 406(a) indicate, it is the *transaction* that is prohibited:

> While § 406 does instruct fiduciaries – typically the plan trustees – not to cause the plan to enter into transactions with "parties in interest," § 406 also serves to prohibit transactions between a [plan] and a "party in interest." Even if § 406 imposes an affirmative duty on fiduciaries not to cause the plan to enter into certain prohibited transactions, this in no sense lessens the fact that a transaction between a plan and a "party in interest" remains a prohibited transaction under § 406.

*Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1421 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999); *see also Reich v. Rowe*, 20 F.3d at 31 n.7.

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[10] *See, e.g., LeBlanc v. Cahill*, 153 F.3d 134, 150-51 (4th Cir. 1998); *Reich v. Stangl*, 73 F.3d at 1031.

### C. Related Statutory Provisions Confirm That Parties In Interest Are Prohibited From Engaging In Transactions Specified In Section 406(a).

In construing ERISA, this Court will not engage in the "'blue pencil' method of statutory interpretation – omitting all words not part of the clauses deemed pertinent to the task at hand." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 142 (1985). When the opening clause of § 406(a) is read in conjunction with other relevant statutory provisions, it is clear that Congress intended to prohibit non-fiduciary parties in interest from engaging in prohibited transactions with a plan.[11]

1. **Section 3003(c).** ERISA § 3003, 29 U.S.C. § 1203, sets out "Procedures in connection with prohibited transactions." Section 3003(c) provides: "Whenever the Secretary of Labor obtains information indicating that *a party-in-interest or disqualified person is violating section 406 of this Act*, he shall transmit such information to the Secretary of the Treasury." 29 U.S.C. § 1203(c) (emphasis added). Section 3003(c) thus states, in express terms, that a party in interest may violate § 406. Consequently, this

[11] The court of appeals believed that its interpretation is "strengthened when we consider the [statutory] context" of ERISA § 406(a), because ERISA §§ 401-414, 29 U.S.C. §§ 1101-1114, "deal with 'Fiduciary Responsibilities.'" J.A. 348. In fact, several provisions of ERISA §§ 401-414 (apart from the prohibited transaction provisions at issue in this case) impose responsibilities on non-fiduciaries. *See, e.g.*, ERISA § 402(b), 29 U.S.C. § 1102(b) (establishing required features of a plan); ERISA § 411, 29 U.S.C. § 1111 (prohibiting persons who have been convicted of specified crimes from serving in certain non-fiduciary positions); ERISA § 412, 29 U.S.C. §1112 (requiring that "[e]very fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan . . . shall be bonded.") Thus, the statutory context does not support the conclusion that § 406 deals solely with fiduciaries.



provision strongly supports the conclusion that a party in interest who engages in a prohibited transaction with a plan violates § 406.

2. **Section 502(i).** ERISA § 502(i), 29 U.S.C. § 1132(i), provides:

> In the case of a transaction prohibited by section 406 by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction . . . except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of [the Internal Revenue] Code) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of such Code.

Section 502(i)'s reference to "a transaction prohibited by § 406 by a party in interest" supports the conclusion that § 406 prohibits certain *transactions*, and that a party in interest who engages such a transaction violates § 406(a). Moreover, § 502(i) imposes a civil penalty on any party in interest (including a non-fiduciary party in interest) who engages in a transaction prohibited by § 406(a) (except for a transaction with a plan described in § 4975(e)(1) of the Internal Revenue Code). Section 502(i), like § 3003, thus forecloses any argument that Congress merely intended to prohibit fiduciaries from causing plans to engage in prohibited transactions, while leaving non-fiduciary parties in interest free to engage in such transactions if they could get away with them. As the district court noted, if non-fiduciary parties in interest are not required to avoid engaging in

transactions prohibited under § 406(a), Congress would have no basis for penalizing them for engaging in such transactions. J.A. 304.

The court of appeals recognized that § 502(i) creates a "viable distinction" between non-fiduciary parties in interest who engage in transactions prohibited by § 406(a) and non-fiduciaries who assist a fiduciary in violating a fiduciary obligation under § 404 of ERISA, 29 U.S.C. § 1104. *Id.* 349. The court of appeals concluded, however, that § 502(i) "makes the absence of a specific provision imposing civil remedies on parties in interest all the more striking." *Id.* 350. But Congress is not required to enact specific provisions for each civil remedy that it creates. Congress may instead use general statutory language to create "catchall" remedial provisions, such as § 502(a)(3) and (a)(5), to provide a "safety net" in case more specific remedial provisions are inadequate. *See Varity Corp.*, 516 U.S. at 509-13 (rejecting a similar argument). Moreover, for the reasons explained in Part II below (*see* pages 33-35), Congress is unlikely to have intended § 502(i) as the *exclusive* remedy available against non-fiduciary parties in interest who engage in prohibited transactions.[12]

3. **§ 502*(l)*.** Section 502*(l)*, added to ERISA in 1989, provides:

> (1) In the case of –
>
> (A) any breach of fiduciary responsibility under (or other violation of) part 4 by a fiduciary, or

[12] ERISA Section 408(a) also focuses on transactions, by giving the Secretary authority to exempt "any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 406 and 407(a)." 29 U.S.C. § 1108(a).



> (B) any knowing participation in such a breach or violation by any other person,
>
> the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.
>
> (2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary *or other person* with respect to a breach or violation described in paragraph (1) –
>
> (A) pursuant to any settlement agreement with the Secretary, or
>
> (B) ordered by a court to be paid by such fiduciary *or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5).*

29 U.S.C. § 1132(*l*) (emphasis added).

The language of § 502*(l)* indicates that a non-fiduciary party in interest may be ordered to pay money "to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection . . . (a)(5)." If a non-fiduciary party in interest were not subject to such a judicial proceeding, there would be no "applicable recovery amount" for persons other than fiduciaries, and thus no basis for imposing a civil penalty against a non-fiduciary under § 502(*l*).[13]

[13] In *Mertens*, the Court suggested in passing that the phrase "other persons" in Section 502(*l*) may refer solely to cofiduciaries. *See* 508 U.S. at 260-61. But a cofiduciary *is* a fiduciary. Moreover, "person" is a defined term in ERISA, and it does not mean

(...footnote continued)

Subsection 502(*l*)(4) confirms that Congress intended § 502(a)(3) and (a)(5) to apply to non-fiduciary parties in interest who engage in prohibited transactions:

> The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or *other person with respect to such transaction under subsection (i) of this section and section 4975 of the Internal Revenue Code of 1986.*

29 U.S.C. §1132(*l*)(4) (emphasis added). As both Subsection (i) and § 4975 of the Internal Revenue Code explicitly apply to non-fiduciary parties in interest who engage in prohibited transactions. Section 502(*l*) thus provides strong textual support for the conclusion that non-fiduciary parties in interest, as well as fiduciaries, are prohibited from engaging in transactions proscribed by § 406. *See Mertens*, 508 U.S. at 265 n.1 (White, J., dissenting); *cf. Varity Corp.*, 516 U.S. at 510 (noting that § 502(*l*) supports the conclusion that awards of relief to participants and beneficiaries, as well as to plans, are authorized under § 502(a)(3)).

4. **Section 4975(h)**. Section 4975(h) of the Internal Revenue Code provides additional textual support for the conclusion that non-fiduciary parties in interest who engage in prohibited transactions with a plan are subject to civil actions for equitable relief under ERISA § 502(a)(3) and (a)(5). Section 4975 provides, in subsections (a) and (b), for

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(. . . continued)
"fiduciary." *See* ERISA § 3(9), 29 U.S.C. § 1002(9). When Congress wished to refer solely to cofiduciaries in ERISA, it did so. *See* ERISA § 405, 29 U.S.C. § 1105 (providing that, in specified circumstances, "a fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan").



the imposition of a two-tier excise tax on "disqualified persons" who participate in prohibited transactions and are not acting solely in a fiduciary capacity. Section 4975(h) provides: "Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary [of the Treasury] shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." 26 U.S.C. § 4975(h). A "correction" is defined as "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." *Id.* § 4975(f)(5).

Section 4975(h) clearly assumes that the Secretary of Labor has the authority to "obtain a correction" of the prohibited transaction. *Id.* § 4975(h). The only means available to the Secretary of Labor to obtain a correction against a non-fiduciary disqualified person (or party in interest) is a civil action seeking restitution under § 502(a)(5). *See Reich v. Stangl*, 73 F.3d at 1034; *Reich v. Compton*, 57 F.3d at 286. If the Secretary of Labor is not authorized to bring such an action, § 4975(h) directs the Secretary of the Treasury and the Secretary of Labor to engage in a bureaucratic exercise in futility. It is unlikely that Congress would have required a formal reference to the Secretary of Labor to "obtain a correction" unless Congress believed that the Secretary of Labor is in fact authorized to do so. The text of § 4975(h) thus provides additional support for the conclusion that the Secretary (and, therefore, plan participants, beneficiaries, and fiduciaries) are authorized to bring actions for equitable relief against non-fiduciary parties in interest who engage in prohibited transactions.

### D. "Appropriate Equitable Relief" Includes Restitution Of Plan Assets Without Regard To Whether The Defendant Itself Violated ERISA.

For the reasons explained above, the prohibited transaction provisions of § 406(a) apply not only to fiduciaries who cause a plan to engage in a prohibited transaction with a party in interest, but also to non-fiduciary parties in interest who engage in such transactions. But even if § 406(a) applied only to fiduciaries, non-fiduciary parties in interest would nevertheless be subject to actions for restitution under § 502(a)(3) and (a)(5). When a fiduciary causes a plan to enter into a prohibited transaction with a party in interest, there is clearly an "act or practice which violates" § 406(a). The fiduciary's act of causing the plan to enter into the transaction violates § 406(a), even if the non-fiduciary party in interest's act of entering into the transaction does not. Under well established principles of the law of equitable remedies, the "appropriate equitable relief" for such a violation includes an order requiring the non-fiduciary party in interest to disgorge plan assets obtained in the prohibited transaction, even if the party in interest did not violate ERISA.

"ERISA abounds with the language and terminology of trust law"; accordingly, in determining the scope and meaning of "appropriate equitable relief" under § 502(a)(3) and (a)(5), the Court should look to general "principles of trust law" developed by courts of equity. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989); *see also Varity Corp.*, 516 U.S. at 496; *Central States*, 472 U.S. at 570-71. In this instance, Congress *expressly* directed the courts to look to common (*i.e.*, non-statutory) law by authorizing "appropriate equitable relief" to redress violations of ERISA.

"[T]he 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits." *See*



*Mertens*, 508 U.S. at 260.[14] The purpose of restitution is to prevent the defendant's unjust enrichment by recapturing the gains realized by the defendant on account of the transaction. Dobbs § 4.1(1) at 552; *Restatement of Restitution* § 1 (1937). Accordingly, "[r]estitution measures the remedy by the defendant's gain and seeks to force disgorgement of that gain. It differs in its goal or principle from damages, which measures the remedy by the plaintiff's loss and seeks to provide compensation for that loss." Dobbs § 4.1(1) at 555.

Courts of equity developed a variety of restitutionary remedies to avoid unjust enrichment, including constructive trusts, equitable liens, subrogation, and an accounting for profits. *See* Dobbs § 4.3(1)-(5); George Gleason Bogert, *Trusts and Trustees*, §§ 471-501 (rev. 2d ed. 1978); 5 Austin Wakeman Scott & William Franklin Fratcher, *Trusts*, §§ 461-464 (4th ed. 1989); *Restatement of Restitution* §§ 160-162 (1937). These remedies are clearly within the scope of "appropriate equitable relief" available under § 502(a)(3) and (a)(5). Indeed, ERISA's legislative history expressly states that restitution pursuant to a constructive trust is a form of "appropriate equitable relief." S. Rep. No. 93-383, at 105 (1973), 1 Leg. Hist. 1173 ("Appropriate equitable relief may be granted in a civil action. For example, . . . a constructive trust may be imposed on the plan assets, if needed to protect the participants and beneficiaries."). Lower court decisions confirm that restitution pursuant to a constructive trust is an appropriate

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[14] Restitution is an equitable remedy when sought in a case in equity, and a legal remedy when sought in a case at law. *See, e.g., Health Cost Controls of Illinois, Inc. v. Washington*, 187 F.3d 703, 710 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000); *Reich v. Continental Cas. Co.*, 33 F.3d 754, 755-56 (7th Cir. 1994). *See generally* 1 Dan B. Dobbs, *Law of Remedies* § 1.2 at 11, § 4.1(1) at 556, § 4.1(3) at 564-65, §§ 4.2-.3 (2d ed. 1993) (hereinafter "Dobbs").

remedy under § 502(a)(3) and (a)(5). *See Health Cost Controls*, 187 F.3d at 710 (citing cases).

In accordance with its purpose of preventing unjust enrichment, restitution pursuant to a constructive trust is not available only with respect to trustees and other fiduciaries. *See id.* at 711 ("Granted that in times of yore the constructive trust was available only as a remedy against trustees and other fiduciaries, there is nothing to suggest that ERISA's drafters wanted to embed their work in a time warp." (citation omitted)). Nor is restitution limited to wrongdoers. Rather, restitution is available against *any* party that would be unjustly enriched by retaining possession of assets. *See* Dobbs § 4.3(2) at 597 ("[T]he constructive trust is no longer limited to misconduct cases; it redresses unjust enrichment, not wrongdoing."); *see also* Scott & Fratcher, *supra* § 462; *Restatement of Restitution* ch. 7 intro. note (1937).[15]

In sum, "appropriate equitable relief" to redress a violation of § 406(a) includes an order requiring a non-

[15] Assets subject to a constructive trust must be returned to the plaintiff unless the defendant is a "bona fide purchaser," that is, a person who gave value for the assets without knowledge of the circumstances that give rise to the constructive trust. *See Endico Potatoes, Inc. v. CIT Group/Factoring, Inc.*, 67 F.3d 1063, 1068 (2d Cir. 1995) (quoting *Restatement (Second) of Trusts* § 284(1) (1959)); *accord Albee Tomato, Inc. v. A.B. Shalom Produce Corp.*, 155 F.3d 612, 615 (2d Cir. 1998); Dobbs § 4.7(l) at 661-62; *see also Restatement (Second) of Trusts* §§ 288-291 (1959). Knowledge of the breach of trust can be either actual or constructive. *E.g., Albee Tomato*, 155 F.3d at 616 ("a transferee has the requisite constructive knowledge when it 'should know' of the breach of trust"); *Restatement (Second) of Trusts* § 297 cmt. a (1959) ("A third person has notice of the breach not only when he knows of the breach, but also when he should know of it.").



fiduciary party in interest to return plan assets and profits, even if the party in interest has not violated ERISA.[16]

### E. The Secretary Of Labor's Interpretation Of The Statutory Language Is Entitled To Deference.

When confronted with complex questions of statutory interpretation arising under ERISA, this Court has said: "For a court to attempt to answer these questions without the views of the agencies responsible for enforcing ERISA, would be to 'embark[] upon a voyage without a compass.'" *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989) (quoting *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 568 (1980)). For the reasons set forth above, the statutory language answers the question presented in this case in Petitioners' favor. But if the Court were to conclude that the statutory language is ambiguous, the interpretation of the Secretary of Labor would be entitled to deference.

[16] Additional support for the conclusion that "appropriate equitable relief" under Section 502(a)(3) and (a)(5) includes "make whole" relief is found in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. In 1972 (two years prior to the enactment of ERISA), Congress amended Section 706 of Title VII to provide that a court may "order such affirmative action as may be appropriate, which may include . . . back pay, . . . *or any other equitable relief as the court deems appropriate*." 86 Stat. 103, 107 (1972) (codified as amended at 42 U.S.C. § 2000e-5(g)(l)) (emphasis added). When Congress employs statutory language that is nearly identical to language it has used in a prior statute, Congress generally is presumed to intend that the language be given the same meaning. *See Traynor v. Turnage*, 485 U.S. 535, 546 (1988). Moreover, Congress is presumed to be aware of prior judicial interpretations of similar statutory provisions. *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990). In 1974 (seven months before Congress enacted ERISA), this Court's opinion in *Curtis v. Loether*, 415 U.S. 189 (1974), stated that "the courts of appeals have characterized backpay as an integral part of an equitable remedy, a form of restitution," in Title VII cases. *Id.* at 197.

When Congress has not "directly spoken to the precise question at issue," the agency's interpretation of the statute must be accepted as long as it is "based on a permissible construction of the statute." *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). Apart from *Chevron*, an agency's interpretations "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944).

In this case, the agency's interpretation is not in doubt. The Secretary of Labor has brought actions against non-fiduciary parties in interest under § 502(a)(5). *See, e.g., Reich v. Compton*, 57 F.3d at 285-87; *Reich v. Stangl*, 73 F.3d at 1028-29; *Herman v. South Carolina Nat'l Bank*, 140 F.3d at 1419-22. Those cases could not have been brought unless the Secretary interpreted § 502(a)(5) – and, by necessary extension, § 502(a)(3) – as authorizing suits for equitable relief against non-fiduciary parties in interest that engage in prohibited transactions. In addition, the Secretary has filed briefs as an *amicus curiae* in the courts of appeals, *see, e.g., LeBlanc v. Cahill*, 153 F.3d at 138, and in this Court setting forth her interpretation of the statute.

In *Auer v. Robbins*, 519 U.S. 452 (1997), the Court deferred to the agency's position expressed for the first time in an *amicus* brief where the position is "in no sense a *post hoc* rationalization advanced by an agency seeking to defend past agency action against attack," and where there is "no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Id.* at 462 (internal quotation and citation omitted). In this case, as in *Auer*, the agency's position is not a "*post hoc* rationalization," and there is no reason to suspect that the agency's position does not reflect its fair and considered judgment on the question presented. Accordingly, the Secretary's interpretation is entitled to deference.



## II. INTERPRETING SECTION 502 TO PERMIT RECOVERY OF PLAN ASSETS FURTHERS THE PRINCIPAL PURPOSE OF ERISA.

ERISA, like other statutes, should be interpreted in the light of the "basic purposes" of the statute. *Varity Corp.*, 516 U.S. at 513; *see John Hancock Mut. Life Ins. Co.*, 510 U.S. at 94-95 (1993) (interpretation of ERISA guided by the "object and policy" of the statute). "The principal object [of ERISA] is to protect plan participants and beneficiaries." *Boggs*, 520 U.S. at 845. As several courts of appeals have recognized, unless plan participants and beneficiaries are permitted to seek restitution of plan assets from non-fiduciary parties in interest, it will often be "difficult or impossible to undo such illegal transactions" and restore the assets to the plan. *Nieto v. Ecker*, 845 F.2d at 874; *accord LeBlanc v. Cahill*, 153 F.3d at 152-53; *Reich v. Compton*, 57 F.3d at 286 (quoting *Nieto*). Moreover, as the court of appeals explained in *Reich v. Stangl*,

> It would make little sense to grant the Secretary such broad enforcement powers to stop ongoing violations of ERISA and then to limit the Secretary's power to recover plan assets acquired through these same violations. Such an interpretation of § 502(a)(5) would effectively create a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring.

73 F.3d at 1031.

### A. Section 502(i) Does Not Provide Adequate Protection For Plan Participants And Beneficiaries.

Section 502(i)'s civil penalty provision provides no assurance that non-fiduciary parties in interest will return plan assets obtained in a prohibited transaction. Accordingly, it is unlikely that Congress intended § 502(i) as the exclusive

remedy available against non-fiduciary parties in interest that engage in prohibited transactions.

*First*, § 502(i) establishes a civil *penalty*, not a remedy. The penalty is paid to the federal government, not to the plan. To be sure, a party in interest may avoid a 100 percent penalty by making a correction. But § 502(i) is not structured in a way that creates a clear economic incentive for a party in interest to return assets to the plan. If the party in interest does *not* correct the transaction, the penalty may not exceed "100 percent of the amount involved." ERISA § 502(i), 29 U.S.C. § 1132(i). If, on the other hand, the party in interest *does* correct the transaction, it remains subject to a penalty of "5 percent of the amount involved . . . for each year or part thereof during which the prohibited transaction continues." *Id.* As the district court noted, a profit-maximizing party in interest might choose to pay a 100 percent penalty to the government rather than repaying the plan 100 percent of the amount involved and in addition paying the government a penalty of 5 percent of the amount involved multiplied by the number of years the transaction goes uncorrected. *See* J.A. 306.[17]

*Second* (and even more significant as a practical matter), the Department of Labor simply lacks the enforcement resources to detect and penalize all (or even most) prohibited transactions.[18] Thus, if § 502(i) is the exclusive means available under ERISA to force parties in interest to correct

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[17] Section 502(i) makes sense when viewed as a non-exclusive penalty provision. Because the party in interest remains subject to an action for restitution under Section 502(a)(3) or (a)(5), it cannot reduce its overall liability by refusing to correct the transaction.

[18] *See* H.R. Conf. Rep. No. 101-386, at 432 (1989) (noting that the Department of Labor oversees about 5.5 million employee benefit plans, but has resources to investigate only about 3,000 plans per year).



prohibited transactions, it is inevitable that many prohibited transactions will go uncorrected.

*Third*, § 502(i) applies only to a subset of ERISA plans, primarily welfare benefit plans. Section 502(i) does not apply at all to "a transaction with respect to a plan described in section 4975(e)(1)," such as the Ameritech plans involved in this case. For these reasons, § 502(i) provides inadequate protection for plan participants and beneficiaries.

### B. Section 4975 Does Not Provide Adequate Protection For Plan Participants And Beneficiaries.

Section 4975, like § 502(i), falls well short of providing adequate protection for plan assets. As one court of appeals has explained:

> The fact that Congress has provided an explicit penalty for parties in interest who participate in prohibited transactions does not affect our conclusion that § 502(a)(3) provides a *remedy* against such persons. The tax is not a remedy but, in essence, a civil penalty; interpreting the tax as exclusive would leave plans and their participants with no recourse against persons clearly covered by the Act who violate its provisions, not a result likely contemplated by Congress.

*Nieto*, 845 F.2d at 874 n.6.

Congress plainly did not view § 4975 as an exclusive remedy, because it required the Secretary of the Treasury to "notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction." 26 U.S.C. § 4975(h). It is not surprising that Congress viewed § 4975 as non-exclusive. Only the Internal Revenue Service is authorized to enforce the excise tax. The Service is authorized to waive the second-tier tax "in appropriate cases." ERISA § 3003(a), 29 U.S.C. § 1203(a). Given its role as a tax collection agency, there is no

assurance that the Service will give priority to the interests of plan participants and beneficiaries. Moreover, the Service has the resources to audit only a tiny fraction of the hundreds of thousands of pension plans established by employers throughout the country.[19] Collection of the excise tax thus depends largely on voluntary self-assessment by the disqualified persons who participate in prohibited transactions. It is unrealistic to believe that either the Service or disqualified persons will adequately protect the interests of plan participants and beneficiaries. The many demands on the Service's resources, and the number, size, and complexity of the plans to which the excise tax applies, prevent the Service from asserting excise tax liability in a significant percentage of the cases to which the tax applies.[20] Relying

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[19] In 1995, 693,404 pension plans filed Form 5500 series reports with the Internal Revenue Service. *See* Pension and Welfare Benefits Administration, U.S. Department of Labor, *Private Pension Plan Bulletin: Abstract of 1995 Form 5500 Annual Reports*, No. 8 (Spring 1999).

[20] Total receipts from the first-tier excise tax under Section 4975 represent a tiny fraction of the Treasury's total receipts. *See* H.R. Conf. Rep. No. 105-220, at 794 (1997) (estimating that an increase in the tax rate from 10 percent to 15 percent would produce additional revenue of $2 million in 1998 and $4 million per year thereafter); Joint Committee on Taxation, *Estimated Budget Effects of Chairman's Mark of a Committee Amendment to the Revenue Provisions of H.R. 3448, the "Small Business Job Protection Act of 1996," Scheduled for Finance Committee Markup on June 12, 1996*, No. JCX-27-96, at 3 (June 11, 1996) (estimating that an increase in the 5 percent tax rate to 10 percent would produce additional tax revenues of $2 million in 1997 and $4 million per year thereafter). By comparison, for the 1997 fiscal year, the Treasury Department reported aggregate receipts of $1,578,951 million, including aggregate corporate and individual income tax receipts of $919,759 million and aggregate excise tax receipts of $56,926 million. *See* Financial Management Service, U.S. Department of the Treasury, *United States Government Annual Report - Fiscal Year 1997* (Receipts by Source Category).



on voluntary self-assessment by the disqualified persons amounts to relying on the fox to guard the hen house.

Moreover, because the Code's excise tax provisions differ in certain respects from ERISA's prohibited transaction provisions, the excise tax does not apply to all of the transactions that ERISA prohibits. For example, the definition of "party in interest" in Title I is broader in certain respects than the definition of "disqualified person" in § 4975:

- Title I defines a "party in interest" to include *all* employees of certain parties in interest. By contrast, § 4975 defines a "disqualified person" to include only "highly compensated employees." *Compare* ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H), *with* 26 U.S.C. § 4975(e)(2)(H).

- Title I defines a "party in interest" to include employees, officers, directors, and 10 percent-or-greater shareholders of service-providers to the plan. § 4975 does not include these parties in its definition of "disqualified person." *Compare* ERISA § 3(14)(H), 29 U.S.C. § 1002(14)(H), *with* 26 U.S.C. § 4975(e)(2)(H).

- Title I defines a "party in interest" to include a 10 percent-or-greater partner or joint venturer of a service-provider to the plan. Section 4975 does not include these parties in its definition of a "disqualified person." *Compare* ERISA § 3(14)(I), 29 U.S.C. § 1002(14)(I), *with* 26 U.S.C. § 4975(e)(2)(I).

Because the two definitions differ, some party-in-interest transactions prohibited by Title I are not subject to the Code's excise tax on disqualified persons. If the excise tax is the exclusive remedy available against nonfiduciary parties

in interest, the consequence is that there is no remedy at all against non-fiduciary parties in interest for some prohibited transactions.

### C. Other Potential Remedies Do Not Provide Adequate Protection For Plan Participants And Beneficiaries.

Respondents have pointed to ERISA claims against fiduciaries and "potential[]" claims against parties in interest under state law or other federal laws as sufficient to protect plan assets. Br. in Opp. 17. In fact, these additional remedies are not adequate to ensure that plans will recover assets transferred to a non-fiduciary party in interest in a prohibited transaction. A fiduciary that causes the plan to engage in the prohibited transaction may not possess sufficient assets of its own to make up the loss. *See Reich v. Continental Cas. Co.*, 33 F.3d at 757 (noting that fiduciary lacked sufficient assets). Moreover, claims under other laws may well be barred under ERISA's powerful preemption provision.

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides: "Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 4(a) [29 U.S.C. § 1003(a)] and not exempt under section 4(b) [29 U.S.C. § 1003(b)]." As this Court has recognized, ERISA's "'pre-emption clause is conspicuous for its breadth.'" *Ingersoll-Rand*, 498 U.S. at 138 (quoting *FMC Corp. v. Holliday*, 498 U.S. 52, 56 (1990)). In *Mertens*, four Justices observed that "it is difficult to imagine how any common-law remedy for . . . participation in a breach of fiduciary duty concerning an ERISA-governed plan . . . could have survived the enactment of ERISA's 'deliberately expansive' preemption provision." 508 U.S. at 267 n.2 (White, J., dissenting) (quoting *Ingersoll-Rand*, 498 U.S. at 138 (citation omitted)). In this case, the



district court has already held that Petitioners' state-law claims are preempted by § 514(a). Although that ruling was not certified for interlocutory appeal (and in any event was influenced by the district court's conclusion that Congress intended "to make § [502(a)(3)] plaintiffs' exclusive remedy," J.A. 337), it nevertheless suggests that if the Court were to hold that § 502(a)(3) does not provide a remedy, participants and beneficiaries might be left with no remedy at all against non-fiduciary parties in interest who engage in prohibited transactions l.[21]

## III. THE LEGISLATIVE HISTORY OF ERISA IS CONSISTENT WITH THE STATUTORY LANGUAGE.

Although the court of appeals "hesitate[d] to give too much weight to the legislative history" of ERISA, J.A. 353, it nevertheless concluded that the legislative history supports its reading of ERISA. The court of appeals' hesitation was well-founded. The legislative history of ERISA is entirely consistent with the view that courts may award appropriate equitable relief under § 502(a)(3) and (a)(5) against parties in interest who engage in prohibited transactions.

The most relevant piece of legislative history is at odds with the court of appeals' position. The Conference Report

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[21] Interpreting Section 502(a)(3) and (a)(5) to authorize equitable relief against non-fiduciary parties in interest who engage in prohibited transactions will not undermine the purposes and goals of ERISA. At least one court has expressed concern that "extending the threat of liability over the heads of those who only lend professional services to a plan without exercising any control over, or transacting with, plan assets will deter such individuals from helping fiduciaries navigate the intricate financial and legal thicket of ERISA." *Reich v. Rowe*, 20 F.3d at 32. That concern is not present when a defendant engages in a prohibited transaction with the plan (rather than merely advising the plan) and is subject only to an action seeking restitution of plan assets and profits (rather than an action seeking open-ended liability for damages).

that accompanied ERISA states that "the conference substitute prohibits plan fiduciaries *and parties-in-interest* from engaging in a number of specific transactions." H.R. Conf. Rep. No. 93-1280, at 306 (1974), 3 Leg. Hist. 4573 (emphasis added). As the court of appeals acknowledged, this statement "impl[ies] that *both* parties to the transaction would be liable" under § 406. J.A. 352 (emphasis added); *see also* H.R. Conf. Rep. No. 93-1280, at 307 (1974), 3 Leg. Hist. 4574 ("there is no reason to impose a sanction on a fiduciary (or party-in-interest)" where neither knows the identity of the other).

Other aspects of the legislative history lend further support to the conclusion that Congress intended to authorize actions for equitable relief against parties in interest who engage in prohibited transactions. For one thing, the legislative history describes ERISA's enforcement provisions as intended to "'provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA].'" *Varity*, 516 U.S. at 512 (quoting S. Rep. No. 93-127, at 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions); H.R. Rep. No. 93-533, at 17 (1973), 2 Leg. Hist. 2364 (describing House version in identical terms)). For another, "the legislative history of ERISA repeatedly states that the statute was enacted to protect plan beneficiaries' interests in plan assets." *Stangl*, 73 F.3d at 1034. It therefore seems unlikely that Congress intended to "leave plans and their participants with no recourse against persons clearly covered by the Act who violate its provisions." *Nieto*, 845 F.2d at 874 n.6.

The Seventh Circuit focused on a different aspect of the legislative history. The Senate originally passed a version of ERISA that explicitly imposed liability on non-fiduciaries;



the House version did not contain a parallel provision.[22] The Senate's provision was not included in the final version of ERISA. The court of appeals concluded that Congress considered imposing civil liability on parties in interest who engage in prohibited transactions, and decided not to do so.

The court of appeals' conclusion was unwarranted. Although the Conference Committee decided not to adopt the more particularized enforcement provisions of the Senate version, the Committee also decided to insert language from the Senate bill to create the "catchall" provisions of § 502(a)(3) and (a)(5). *Compare* H.R. 2 (Senate version) § 693, 3 Leg. Hist. 3816-17, *with* ERISA § 502(a). *See also* H.R. Conf. Rep. No. 93-1280, at 327 (1974), 3 Leg. Hist. 4594 (conferees expanded § 502 to allow "an action for breach of a fiduciary duty *or* to enjoin any act or practice which violates the provision of title I of the Act *or* to obtain any other appropriate relief to enforce any provision of that title") (emphasis added). This sequence of events does not indicate that Congress intended to insulate non-fiduciary parties in interest from civil liability.

ERISA § 502(a)(3) and (a)(5) originated in the Senate bill's enforcement provisions. Section 693 of the Senate bill,

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[22] The Senate Bill provided:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay the fund any profits realized by him from such transaction.

H.R. 2, 93d Cong. § 511 (as passed by the Senate on Mar. 4, 1974) (hereinafter "H.R. 2 (Senate version)") (adding § 15(i)), 3 Leg. Hist. 3599, 3780.

entitled "Actions to Redress or Restrain Violations of Fiduciary Duty," provided:

> Civil actions for appropriate relief, legal or equitable, to redress or restrain a breach of any responsibility, obligation, or duty of a fiduciary, including but not limited to, the removal of a fiduciary . . . or against any person who has transferred or received any of the assets of a plan or fund in violation of the fiduciary requirements [of ERISA] . . . may be brought by any participant or beneficiary of [a plan subject to ERISA].

H.R. 2 (Senate version) § 693 (1974), 3 Leg. Hist. 3816. Section 692, entitled "Civil Actions by Secretary of Labor," provided:

> Whenever the Secretary believes that an employees' benefit fund is being or has been administered in violation of the requirements of [ERISA] . . ., the Secretary may petition any district court of the United States having jurisdiction of the parties or the United States District Court for the District of Columbia for an order (1) requiring return to such fund of assets transferred from such fund in violation of the requirements of such Act, (2) requiring payment of benefits . . ., and (3) restraining any conduct in violation of the fiduciary requirements of such Act, or of this Act, and granting such other relief as may be appropriate to effectuate the purposes of this Act."

H.R. 2 (Senate version) § 692, 3 Leg. Hist. 3815-16.

In contrast to Sections 692 and 693 of the Senate bill, the House bill provided a more limited range of civil remedies. The House bill provided that:

> Civil actions under this title may be brought -
>
> . . .



> (2) by the Secretary, or by a participant, beneficiary, or fiduciary for appropriate relief under section 111(d); or
>
> (3) by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title.

H.R. 2, 93d Cong. § 503(e) (as passed by the House on Feb. 28, 1974) (hereinafter "H.R. 2 (House version)"), 3 Leg. Hist. 4047. Section 111(d) of the House bill, enacted as ERISA § 409(a), dealt with a fiduciary's personal liability for breach of fiduciary duty. *See* H.R. 2 (House version) § 111(d), 3 Leg. Hist. 3953-54.

As the Conference Report explained, the House bill authorized the Secretary only "to bring suit for breach of fiduciary responsibility and to enjoin any act or practice" that violates ERISA. H.R. Conf. Rep., No. 93-1280, at 327 (1974), 3 Leg. Hist. 4594. In contrast, the Senate's version conferred specific grants of authority, including actions seeking the return of transferred plan assets. H.R. 2 (Senate version) §§ 692-93, 3 Leg. Hist. 3815-17.

As ultimately enacted by Congress, § 502 of ERISA did not include the particularized remedies set forth in the Senate bill, nor did it limit the available remedies to those provided for in the House bill. Instead, § 502 provided for the types of relief included in the House version, and in addition authorized "any other appropriate relief to enforce any provision of [Title I]." *See* H.R. Conf. Rep., No. 93-1280, at 327-28 (1974), 3 Leg. Hist. 4594. The addition of an expansive "catch-all" provision, derived from the Senate bill, reflects Congress's intent to provide the broadest possible range of equitable remedies to the Secretary of Labor and private plaintiffs. *See Varity Corp.*, 516 U.S. at 512. Accordingly, Congress's decision not to enact the Senate's specific provisions does not support the conclusion that

Congress decided not to impose liability on non-fiduciary parties in interest that engage in prohibited transactions.[23]

## IV. THIS COURT'S DECISIONS IN *MERTENS* AND *LOCKHEED* DO NOT SUPPORT THE COURT OF APPEALS' DECISION.

### A. *Mertens* Does Not Support The Court Of Appeals' Decision.

Most courts of appeals have understood this Court's decision in *Mertens* to be entirely consistent with the view that equitable relief is available under § 502(a)(3) and (a)(5) against non-fiduciary parties in interest who engage in a prohibited transaction with a plan.[24] The Seventh Circuit, in contrast, read *Mertens* as providing strong support for the view that such relief is not available. *See* J.A. 353 ("Ultimately, the dicta in *Mertens* . . . provide[ ] the most guidance.") The Seventh Circuit's reliance on *Mertens* is unwarranted. Neither *Mertens* nor the Court's subsequent

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[23] To be sure, remedies available under the final version of ERISA are not identical to those available under the Senate bill. As the district court observed, the Senate bill's provisions

> would have imposed personal liability on parties in interest, subjecting them to claims for legal relief, *e.g.*, damages. The rejection of those provisions, however, does not necessarily rule out the potential for a compromise somewhere between no civil liability and personal liability for all losses, *e.g.*, the availability of a suit limited to equitable relief.

J.A. 308. "[T]he final language of [Section 502(a)], with its inclusion of catch-all provisions for equitable relief, appears to be just such a negotiated compromise." *Id.*

[24] *See Reich v. Rowe*, 20 F.3d at 31-33; *Reich v. Compton*, 57 F.3d at 285; *Landwehr v. DuPree*, 72 F.3d at 734; *Reich v. Stangl*, 73 F.3d at 1031-32; *Herman v. South Carolina National Bank*, 140 F.3d at 1421-22; *LeBlanc v. Cahill*, 153 F.3d at 151-53.



decision in *Lockheed* supports the result reached by the court of appeals in this case.

The *holding* in *Mertens* – that ERISA does not authorize suits *for money damages* against non-fiduciaries who knowingly participate in a fiduciary's breach of fiduciary duty – provides no support whatever for the Seventh Circuit's ruling. In this case, Petitioners are seeking restitution rather than damages, and the Court recognized in *Mertens* that "the 'equitable relief' awardable under § 502(a)(5) [and § 502(a)(3)] includes restitution of ill-gotten plan assets or profits." 508 U.S. at 260.[25]

The Court's opinion in *Mertens* expressly reserves decision on the question whether § 502(a)(3) and (a)(5) authorize suits against non-fiduciaries who assist a fiduciary in violating its fiduciary obligations. 508 U.S. at 254-55. In *dicta*, the Court expressed doubt that such a suit is available:

> [W]hile ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries, including actuaries, no provision explicitly requires them to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty. It is unlikely,

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[25] The Court explicitly stated that the question whether the defendant's "activities constituted a party-in-interest transaction prohibited by ERISA" was not before it. 508 U.S. at 251 & n.2. In fact, the defendant "was paid by Kaiser, not from assets of the plan." *Mertens v. Hewitt Associates*, 948 F.2d 607, 612 (9th Cir. 1991). Moreover, the plaintiffs in *Mertens* were seeking to impose "joint and several liability, for *all* direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did." 508 U.S. at 262. In this case, in contrast: (1) Respondents acquired plan assets through a prohibited transaction with the plan; (2) Respondents, as essential parties to the transaction, had power to prevent the transaction; and (3) Petitioners are seeking restitution of plan assets and profits rather than joint and several liability for damages.

> moreover, that this was an oversight, since ERISA *does* explicitly impose "knowing participation" liability on cofiduciaries. See § 405(a), 29 U.S.C. § 1105(a). That limitation appears all the more deliberate in light of the fact that "knowing participation" liability on the part of *both* cotrustees and third persons was well established under the common law of trusts.

*Id.* at 253-54 (footnote and citations omitted). In a footnote to the statement that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries," the Court added: "For example, a person who provides services to a plan is a 'party in interest,' 29 U.S.C. § 1002(14)(B), and may not offer his services or engage in certain transactions with the plan, § 1106(a), for more than reasonable compensation, § 1108(b)(2)." 508 U.S. at 254 n.4.

The Court also commented that

> [p]rofessional service providers such as actuaries . . . must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees.

508 U.S. at 262.

The fiduciary-duty provisions at issue in *Mertens* (primarily Sections 405, 409, and 502(a)(2)) differ from Sections 406 and 502(a)(3) and (a)(5). In general, there are no necessary "counter-parties" to fiduciary violations. In contrast, a party in interest *is* a necessary counter-party to a prohibited transaction between a plan and a party in interest.



Thus, Petitioners clearly are not seeking "'appropriate equitable' relief *at large*, but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations . . .' of ERISA." 508 U.S. at 253.

Because the *Mertens dicta* are consistent with the proposition that parties in interest who engage in prohibited transactions may be sued for restitution under ERISA, the Court need not reconsider those *dicta* in order to decide the question in this case in Petitioners' favor. It is nevertheless significant that in *Mertens* four Justices expressed the view that § 502(a)(3) *does* permit actions for equitable remedies against non-fiduciaries who participate in a fiduciary's breach of duty. *See* 508 U.S. at 263, 265 n.1 (White, J., dissenting, joined by the Chief Justice, Justice Stevens, and Justice O'Connor). The Justices who joined Justice White's opinion reasoned that § 502(a)(3) creates a cause of action "'to redress . . . violations' of the statute." *Id.* There is no reason to conclude that § 502(a)(3) "stop[s] with the breaching fiduciary," because the statutory text "does not expressly provide for such a limitation and it does not seem appropriate to import one, given that trust beneficiaries clearly had such a remedy at common law" and that ERISA "is grounded in that common law and was intended, above all, to protect the interests of beneficiaries." *Id.* Moreover, "§ 502(*l*)[] seems clearly to reflect Congress' understanding that ERISA provides such a remedy." *Id* For these reasons (as well as the fact equitable remedies are not restricted to wrongdoers), *Mertens' dicta* concerning the availability of actions against non-fiduciaries outside the prohibited transaction context should not be adopted as a holding of this Court.

### B. *Lockheed* Does Not Support The Court Of Appeals' Decision.

Finally, this Court's decision in *Lockheed* is also entirely consistent with the conclusion that non-fiduciary parties in

interest who engage in prohibited transactions are subject to suits for equitable relief under § 502(a)(3) and (a)(5). *Lockheed* holds that § 406 is not violated unless the plaintiff shows that a fiduciary caused the plan to engage in a prohibited transaction. The holding in *Lockheed*, like the holding in *Mertens*, provides no support for the court of appeals' ruling in this case.[26] Indeed, the Court's opinion in *Lockheed* explicitly states that its decision is consistent with cases holding that a non-fiduciary party in interest who engages in a transaction prohibited by § 406(a) is subject to a suit for equitable remedies. 517 U.S. at 889 n.3.

As the Seventh Circuit recognized, "in *Lockheed* the Court was once again not addressing the issue of party-in-interest liability under § [406]." J.A. 352. Although other courts of appeals have detected in *Lockheed* indications of support for party-in-interest liability, *see LeBlanc v. Cahill*, 153 F.3d at 152; *Herman v. South Carolina National Bank*, 140 F.3d at 1422 n.14, it is fair to say that *Lockheed* leaves the question open. On the one hand, the Court's opinion in *Lockheed* observes that the *Mertens* comments concerning party-in-interest liability (like its comments concerning non-fiduciary liability generally) were *dicta*. On the other hand, it recognizes that a number of courts of appeals have relied on the *Mertens dicta* in finding a cause of action against parties in interest that participate in prohibited transactions, does not suggest that those courts were in error, and explicitly recognizes that the result reached by those courts is consistent with the holding in *Lockheed*.

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[26] In this case, it is clear that (1) NISA, as investment manager with discretionary authority over investment decisions, was a fiduciary, and (2) NISA caused the transactions to occur.



## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust; AMERITECH CORPORATION; and JOHN A. EDWARDSON,

*Petitioners*,

—v.—

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## QUESTION PRESENTED

Does the Employee Retirement Income Security Act ("ERISA") affirmatively authorize a private cause of action against a nonfiduciary party-in-interest on the theory that a nonfiduciary's entry into a "prohibited transaction" constitutes a "direct" violation of ERISA § 406(a), 29 U.S.C. § 1106(a), notwithstanding that: (a) the language of § 406(a) ("a fiduciary ... shall not cause the plan to engage" in a prohibited transaction) prohibits conduct only by fiduciaries; (b) the legislative history demonstrates that Congress specifically considered imposing civil liability on nonfiduciary parties-in-interest for participating in prohibited transactions, but opted not to; and (c) this Court has expressed an unwillingness to infer private causes of action under ERISA?

Even if this Court were to allow the posited private cause of action, there is an alternative ground for affirmance that presents a subsidiary question: whether liability under any such implied cause of action may be imposed upon a nonfiduciary party-in-interest even if it did *not* know that the fiduciary who caused the plan to engage in the transaction was violating § 406(a); here, petitioners failed to proffer admissible evidence that respondent Salomon knew that a fiduciary was violating § 406.

## CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. are wholly owned by Salomon Brothers Holding Company Inc., which in turn is wholly owned by Salomon Smith Barney Holdings Inc., which in turn is wholly owned by Citigroup Inc., whose stock is publicly traded.



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| JA | Joint Appendix |
| PB | Brief for the Petitioners (filed February 22, 2000) |
| Pet. | Petition for Writ of Certiorari (filed October 4, 1999) |
| Pet. Reply | Reply Brief for Petitioners in support of petition for writ of certiorari (filed December 14, 1999) |
| R. | Record in the District court (*see* docket entries listed on JA 1-28) |
| Resp. Opp. | Brief of Respondents in Opposition to petition for writ of certiorari (filed December 3, 1999) |
| Sal. C.A. App. | Supplemental Appendix of Defendants-Appellants in the Court of Appeals (filed in the Court of Appeals August 4, 1998) |
| Sal. C.A. Reply App. | Supplemental Reply Appendix of Defendants-Appellants in the Court of Appeals (filed in the Court of Appeals on October 16, 1998) |
| USB | Brief of the United States as Amicus Curiae Supporting Petitioners (filed February 22, 2000) |

## STATEMENT OF THE CASE

The Seventh Circuit unanimously held that ERISA does not provide a private cause of action against a nonfiduciary party-in-interest under ERISA § 406, rejecting petitioners' theory that such nonfiduciary's entry into a prohibited transaction constitutes a "direct" violation of § 406(a).

**1. Factual background.** Petitioner Ameritech Pension Trust ("APT") is a trust for two employer-funded defined-benefit plans sponsored by petitioner Ameritech Corporation ("Ameritech Corp.").[1] *See* Sal. C.A. App. 354. APT purchased from Salomon four participation interests in cash flow and appreciation of four groups of motel properties. *See* JA 182-87, 192-99, 343. The purchases followed extensive negotiations between Salomon and two fiduciaries of APT — Ameritech Corp. and National Investment Services of America ("NISA"), APT's investment manager. *See* JA 343; Sal. C.A. App. 359, 373-88, 639-47, 668-73, 681-83. Ameritech Corp. and NISA executives analyzed and negotiated the purchases on APT's behalf. *See id.* At the time, APT was approximately the tenth largest pension fund in the country, with about $10 billion of assets. *See id.* at 357.

At the time, none of those involved regarded Salomon as a party-in-interest or believed that the transactions were ERISA prohibited transactions: not Ameritech's own chief investment officer (JA 96-98), not the CEO of fiduciary NISA (JA 65-67), and not the Salomon executives (JA 52, 55-56). *See also* Sal. C.A. App. 393-406, 635-38. For each of the years 1987-1989 (when the transactions occurred), Ameritech filed reports with the Government that represented that no prohibited transactions had occurred. *See* JA 165-70; Sal. C.A. App. 397-406, 735-40.

But in 1990, the lodging market began to collapse. *See* JA 99-100, 112-14, 117-18, 343; Sal. C.A. App. 624, 630, 652-

[1] Petitioners are sometimes collectively referred to herein as "Ameritech" and respondents as "Salomon". References to "APT" and "Ameritech Corp." are to those individual entities.

57. Motels of America ("MOA"), which owned three of the four groups of motels involved, filed for bankruptcy in December 1990. *See* Sal. C.A. App. 299, 367. Also in 1990, the Ameritech pension plans' management changed, and new management revisited earlier investment policies and decisions. *See* Sal. C.A. App. 360-61, 592, 627, 629, 648, 667. By 1991, fiduciaries Ameritech Corp. and NISA had agreed to cooperate in litigation against Salomon. *See* JA 218; Sal. C.A. App. 364. Also in 1991, APT sold its three MOA participation interests to a company that acquired control of MOA, and MOA also agreed to cooperate in litigation against Salomon. *See* JA 156-59; Sal. C.A. App. 364-66.

In 1992, Ameritech filed suit, seeking to hold Salomon alone responsible for APT's participation-interest losses. Fiduciary Ameritech Corp. elected not to sue itself; having agreed to cooperate in litigation against Salomon, fiduciary NISA was not sued either. Ameritech concedes that no employee ever contributed any money to the plans; that Ameritech Corp. is obliged to pay fixed benefits irrespective of investment performance; and that any losses suffered by APT on the participation-interest investments were borne by Ameritech Corp. and did not cost any employee or retiree any money. *See* JA 221-22.

**2. Proceedings in the courts below.** The district court's June 1996 Order granted summary judgment dismissing Count I — alleging that Salomon breached its fiduciary duties — because there was no evidence that Salomon was a fiduciary of APT. *See* JA 289-99. The district court also dismissed Count III — alleging that fiduciary NISA caused APT to enter into prohibited transactions in violation of § 406 and that Salomon "knowingly participated" in NISA's breach — on the ground that nonfiduciaries cannot be held liable for knowing participation in a fiduciary's breach. *See* JA 320-21.

Count II alleged that "Salomon caused the Plan to engage in" § 406(a) prohibited transactions. JA 39-42. The district court dismissed any claim in Count II "premised on an alleged breach of fiduciary duty" (JA 324), but upheld Count II in part, to the extent that (as recharacterized by Ameritech) Count II asserted a purported "direct" cause of action against Salomon on the theory that Salomon, even if *not* a fiduciary, violated § 406 as a party-in-interest by entering into prohibited transactions. *See* JA 299-310.



On a § 1292(b) interlocutory appeal, Salomon sought reversal of the district court's ruling upholding Count II in part. Ameritech did *not* cross-appeal or otherwise contest the dismissal of Counts I and III and partial dismissal of Count II. The court of appeals unanimously reversed the district court's ruling upholding Count II and granted summary judgment to Salomon. *See* JA 354. The panel circulated its opinion to all judges of the court in regular active service. Only one judge voted to rehear the case *en banc*. *See id.*[2]

**3. Response concerning matters not before this Court.** The validity of Ameritech's allegations that Salomon was a party-in-interest and that the transactions were nonexempt prohibited transactions (*see* PB 7-8) is not before this Court. The courts below did not rule on the merits of these allegations, and Salomon disputes them. *See* JA 347. As noted above, none of those involved at the time believed Salomon was a party-in-interest or that the transactions were prohibited. APT transacted with Salomon at arm's length and Salomon was just one of dozens of securities firms with whom APT and its outside investment managers dealt. *See* JA 71-72, 98, 123, 183-84, 186-87, 193-94, 197-98; Sal. C.A. App. 419-43; Sal. C.A. Reply App. 481-500. Salomon disputes Ameritech's contention that arm's-length dealings in principal transactions or nondiscretionary equity trades (including trades where the plan is represented by its own investment-manager fiduciary) make a broker-dealer a "per-

[2] The Court of Appeals did not reach Salomon's alternative argument seeking reversal of the district court's dismissal of Salomon's contribution counterclaim, which Salomon reserves. *See* Resp. Opp. 14 n.7.

son providing services" to a plan and thus a party-in-interest under ERISA § 3(14)(B). *See* R.141, pp. 10-13; R.143 (Vol. F, ¶¶ 271-337); Sal. C.A. Reply App. 474-500; R.167 pp. 1-8. Were there to be further proceedings, Salomon would also dispute many "facts" asserted by Ameritech *(see* PB 6-8), including Ameritech's "sound bites" from testimony of two MOA employees. *Compare* PB 8 *with* JA 81-95, 102-15, 131-46, 156-59, 219. Salomon's position is that the participation interests had substantial value at the time they were sold and offered the potential for large gains (*see, e.g.*, JA 44-49; Sal. C.A. App. 444-55; Sal. C.A. Reply App. 508-22), but were subject to substantial risks that Ameritech fully understood (*see, e.g.*, JA 125-26, 128-29; Sal. C.A. App. 436-43, 674; Sal. C.A. Reply App. 522-41), and that APT's losses resulted from an adverse turn in the market (*see* pp. 1-2, *supra*).[3]

## SUMMARY OF ARGUMENT

Ameritech would have this Court read into ERISA duties and civil liabilities of nonfiduciary parties-in-interest that are not expressed in the statute, and thereby infer a cause of action to enforce such implied duties and liabilities. Ameritech argues that liability may be imposed even upon defendants that are *not* violators and *not* wrongdoers. But Ameritech's positions find no support in the text of ERISA and require an approach to statutory construction alien to that employed in this Court's decisions.

Section 406 prohibits conduct by fiduciaries. Subsection 406(a)(1) provides that "a fiduciary with respect to a plan shall not cause the plan to engage in" certain transactions, some (but not all) of which are between a plan and a party-in-interest. JA 242-44. But Salomon was *not* a fiduciary of APT. *See* p. 2, *supra*. Ameritech contends that Salomon is

[3] Ameritech's parol evidence of a supposed agreement by Salomon to monitor the investments (PB 8 n.6) is not germane to any issue before this Court, was disputed, and (as the district court observed in ruling it inadmissible) is contradicted by the terms of the assignments. *See* JA 295-99.



a nonfiduciary party-in-interest on the theory that it is "a person providing services" to APT. However, in contrast to the express prohibition directed at fiduciaries, § 406(a)(1) does *not* prohibit conduct by a *non*fiduciary party-in-interest. And in contrast to § 409 (which provides expressly for the imposition of liability on any "fiduciary" "who breaches" any of the "duties imposed upon fiduciaries" by Title I of ERISA), there is *no* provision in Title I that provides that a *non*fiduciary party-in-interest shall be liable for entering into a transaction prohibited by § 406. *See* Point I.A.1, *infra*.

There is no statutory basis for Ameritech's claim that a *non*violator may be held liable under ERISA for "equitable relief" "to redress" *someone else's* violation of ERISA duties. Section 502(a) simply provides that specified parties may bring suit for particular *relief*; relief under § 502(a)(3)(B)(i) is limited to "other appropriate equitable relief" "to redress" violations of Title I or the terms of a plan. JA 254. By its terms, § 502(a)(3)(B) does not prohibit any conduct, impose any duties, or provide for civil liability. To determine what violations may be redressed by suit under § 502(a)(3) one must look to *other* provisions of Title I or to the terms of the plan. In any event, this nonviolator-liability claim was not pled in the sole count before this Court and was not presented in the court of appeals, and thus has been waived. *See* Point I.A.2, *infra*.

The legislative history confirms that Congress meant what it said. Congress specifically focused on whether to create a cause of action against parties-in-interest who participate in prohibited transactions — and decided *not* to. Thus, the House bill limited liability to fiduciaries. *See* JA 277-81. By contrast, the Senate proposed to provide for civil liability of parties-in-interest (for damages and disgorgement), and authorize civil actions "against *any person* who has transferred or *received* any of the assets of a plan". JA 275-76 (emphasis added). The Conference Committee staff recommended that the conferees "adopt the approach of

the House bill and *not provide civil liability for parties-in-interest*". JA 281-82 (emphasis added). That recommendation was followed. *See* Point I.B, *infra*.

Finally, even if the posited cause of action exists, there is an alternative ground for affirmance: Knowledge of the fiduciary's violation of § 406(a) must be an element of the claim, because the nonfiduciary's liability would be dependent upon proof of the fiduciary's violation. Here, Ameritech failed to proffer admissible evidence that Salomon knew that a fiduciary was violating § 406. *See* Point II, *infra*.

## ARGUMENT

### I. ERISA DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION AGAINST A NONFIDUCIARY PARTY-IN-INTEREST THAT ENTERS INTO A TRANSACTION PROHIBITED BY § 406.

#### A. The statutory text does not authorize the posited private cause of action.

In evaluating whether a cause of action exists under ERISA, this Court has looked to whether ERISA "expressly authorize[s]" the suit. *See Massachusetts Mut. Life Ins.* v. *Russell*, 473 U.S. 134, 145 (1985); *see also Mertens* v. *Hewitt*, 508 U.S. 248, 255 n.5 (1993) ("affirmatively authorizes"). No ERISA provision expressly authorizes a cause of action against a nonfiduciary party-in-interest.

##### 1. A nonfiduciary party-in-interest cannot violate § 406.

**a. Section 406 prohibits conduct by fiduciaries only.** The text of § 406(a)(1) prohibits fiduciary conduct only: "A *fiduciary* with respect to a plan *shall not cause* the plan to engage in a transaction, if *he* knows or should know that such transaction constitutes" a nonexempt prohibited transaction (emphasis added). Section 406(a) does *not* contain any



comparable prohibition addressed to *non*fiduciary parties-in-interest. No words of duty or prohibition, such as "shall not", are used to proscribe conduct by nonfiduciary parties-in-interest. In addition, § 406(a) contains an express culpability standard for fiduciaries who cause plans to enter into prohibited transactions, but contains no culpability standard for nonfiduciary parties-in-interest — an omission that makes sense only if § 406 does not impose duties upon them.

The "act" that "violates" § 406 — and thus may potentially be subject to civil suit under § 502(a) — can only be the act that § 406 prohibits: a "fiduciary['s] ... caus[ing] the plan to engage in [the] transaction". As the Seventh Circuit stated, the "mere fact that § [406] mentions 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction". JA 349. Ameritech faults the court of appeals for reading § 406(a) "as merely prohibiting fiduciaries from *causing* plans to engage in transactions with parties in interest". PB 19. But that is what § 406(a) says.

Instead of reading § 406 as it is written, Ameritech argues that "Congress intended to prohibit *transactions* between plans and parties in interest" and, therefore, "the prohibitions of Section 406(a) apply to parties in interest". PB 20. But Ameritech's conclusion does not follow from its premise. Since it is the fiduciary who has the power to cause the plan to engage in the transaction, effecting the desired prohibition by prohibiting fiduciaries — and fiduciaries alone — from causing plans to enter into prohibited transactions makes eminent sense. Indeed, if nonfiduciary parties-in-interest who receive plan assets could be sued, there would exist the specter of fiduciaries, through their choice of whom to sue, seeking to shift to nonfiduciaries responsibility for § 406 violations — as Ameritech Corp. attempts to do here. *See* p. 2, *supra*. A prohibition directed against only one party to a transaction is not unique to § 406: Another section

of ERISA, § 206(e)(1), prohibits a fiduciary from permitting what is defined as a "prohibited payment" during a period in which a plan has a liquidity shortfall; this provision too is directed only to a fiduciary ("the fiduciary ... shall not permit"). And the United States Code contains other provisions entitled "prohibited transactions" that proscribe conduct of only one party to the transaction.[4]

Ameritech's contention that "it is the *transaction* that is prohibited" (PB 21) also ignores that prohibitions are not abstractions — rather prohibitions regulate the behavior of a class of persons. In § 406, Congress chose to regulate fiduciaries: "A fiduciary ... shall not". Notably, both § 406(a) and § 406(b) use the same language ("[a] fiduciary ... shall not"), yet § 406(b) does not even mention the term party-in-interest (nor does § 406(a)(1)(E)). The heading "prohibited transactions" signifies only that § 406 specifies the transactions in which a fiduciary is prohibited from engaging.

Ameritech seeks to distinguish parties-in-interest from other nonviolators with a meaningless tautology: a "*party-in-interest* is a necessary counter-party to a prohibited transaction between a plan and a *party-in-interest*". PB 46 (emphasis altered). But some of the transactions enumerated in § 406 may not involve a party-in-interest counterparty. *See* § 406(a)(1)(D)-(E) and § 406(b). For example, a fiduciary causing a plan to purchase employer securities in excess of § 407's limits violates § 406(a)(1)(E) even if the seller has no connection at all to the plan. And cases Ameritech itself relies upon involve *non*-parties-in-interest as counterparties.[5]

[4] *See, e.g.*, 12 U.S.C. § 371c-1(b)(1)(A) ("Prohibited transactions ... A member bank or its subsidiary ... shall not ..."); 15 U.S.C. § 80b-6 ("Prohibited transactions by investment advisers ... It shall be unlawful for any investment adviser [to] ..."); 22 U.S.C. § 2780(b)(1) ("Prohibited transactions by United States Persons ... A United States person may not ....").

[5] *See Reich* v. *Compton*, 57 F.3d 270, 286-87 (3d Cir. 1995) (§ 406(a)(1)(D)); *LeBlanc* v. *Cahill*, 153 F.3d 134, 151-53 (4th Cir. 1998) (§ 406(b)).



Conversely, fiduciary violations of *other* ERISA provisions, such as § 404(a), *also* may involve counterparties (who may or may not be parties-in-interest). The *sine qua non* of a violation of § 406, like a violation of § 404(a), is the fiduciary's conduct — *not* the presence of a party-in-interest counterparty. Similarly, that a party-in-interest has "full control over its role" in a transaction (USB 25) does not distinguish a party-in-interest from any other counterparty.

**b. The statutory context confirms that § 406 does not provide the predicate duty and liability for a cause of action against a nonfiduciary party-in-interest.** Section 406 is found in Title I, Subtitle B, Part 4 of ERISA, which concerns "Fiduciary Responsibility". Where Congress sought to impose duties in Part 4, it did so expressly. Thus, § 404 sets forth certain affirmative fiduciary duties: "a fiduciary shall ..." § 404(a)(1). In parallel fashion, §§ 406(a)(1) and (b) set forth prohibitions on fiduciary conduct: "[a] fiduciary ... shall not". The linguistic parallel between §§ 404 and 406 confirms what § 406's words convey: § 406 "simply describes another variety of fiduciary breach". JA 348. Section 406, like § 404(a), does *not* impose duties upon *non*fiduciary counterparties, whether they are parties-in-interest or not.

This Court itself has recognized that § 406, like § 404, establishes duties applicable to fiduciaries: In *Massachusetts Mut.* v. *Russell*, 473 U.S. at 143 n.10, this Court explained that ERISA establishes "duties of loyalty and care *for fiduciaries. With regard to loyalty, the principal provision is § 406*, which in general prohibits self-dealing and sales or exchanges between the plan ... and 'parties in interest'.... With regard to the duty of care, § 404, among other obligations, imposes a 'prudent person' standard...." (emphasis added); *see also Hughes Aircraft* v. *Jacobson*, 525 U.S. 432, 437, 444-45 (1999) (referring to § 406 as one of ERISA's "fiduciary provisions").

Similarly, where Congress sought to provide for civil liability for breach of duties, it did so expressly. Thus, § 409 expressly imposes civil liability on: "a fiduciary ... who breaches any of the ... duties imposed upon fiduciaries by this title". In parallel fashion, § 410 precludes only exculpatory provisions that "purport[ ] to relieve a fiduciary from responsibility or liability".

Congress also expressly addressed what class of persons should bear civil liability for participation in a fiduciary's breach of duty — and provided that only other fiduciaries would bear such liability. Thus, § 405(a) provides that: "a fiduciary ... shall be liable for a breach of fiduciary responsibility of another fiduciary" in specified circumstances, including when "he participates knowingly in" the fiduciary breach. *See Mertens,* 508 U.S. at 254; *see also Central Bank* v. *First Interstate Bank*, 511 U.S. 164, 184 (1994) ("The fact that Congress chose to impose some forms of secondary liability, but not others, indicates a deliberate congressional choice with which the courts should not interfere.").

And Congress specified express standards of culpability that vary from section to section, depending upon whether the defendant-fiduciary is a primary violator (*e.g.*, § 406(a)(1)) or liable for participation in another fiduciary's violation (*e.g.*, § 405(a)). If Congress had intended to provide a cause of action against a nonfiduciary party-in-interest, Congress would have said so — and would have expressly selected a standard of culpability — as the proposed, but rejected, Senate bill did. *See* p. 27, *infra*.

By their terms, §§ 404, 405, 406 and 409 apply only to fiduciaries. No provision of Title I of ERISA imposes comparable express duties or civil liability on *non*fiduciary parties-in-interest. This was neither inadvertent nor because Congress was unable to find the right words. In ERISA's Title *II* excise-tax provisions, Congress was explicit that excise taxes may be imposed upon certain parties-in-interest



(called disqualified persons) who "participate[ ] in the prohibited transaction". IRC § 4975(a) & (b). And the Senate had proposed a provision that would have expressly imposed civil liability upon parties-in-interest — but it was rejected. *See* Point I.B, *infra*. Plainly, "[i]f Congress had wanted to place remedial power against nonfiduciaries in the hands of private parties it would have done so more explicitly as it did in the case of fiduciaries and in the case of co-fiduciaries." JA 350. Indeed, that several sections in Part 4 ("Fiduciary Responsibility") impose duties upon *non*fiduciaries (*see* PB 22 n.11) only further supports *Salomon*'s position by demonstrating that when Congress wished to impose duties or prohibitions upon nonfiduciaries in Part 4, it did so explicitly.

To infer the posited cause of action would do violence to fundamental principles this Court has prescribed for the interpretation of statutes generally and ERISA in particular. As this Court reiterated last Term in another ERISA case: "[I]n any case of statutory construction, our analysis begins with 'the language of the statute.' ... And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft* v. *Jacobson,* 525 U.S. at 438; *see also, e.g., Central Bank,* 511 U.S. at 176-78 (since the text of § 10(b) "does not itself" encompass aiders and abettors, "that conclusion resolves the case"); *Garcia* v. *United States*, 469 U.S. 70, 75 (1984).

These general principles apply with particular force to ERISA cases: This Court has pronounced its "*unwillingness to infer causes of action in the ERISA context,* since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that *Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.*'" *Mertens,* 508 U.S. at 254 (quoting *Russell*, 473 U.S. at 146-47) (emphasis added).[6]

[6] Apart from the absence of a substantive duty or liability upon nonfiduciary parties-in-interest, Ameritech fails to show that it seeks "appropriate equitable relief". Ameritech acknowledges that "[r]estitution is an

**2. Section 502(a)(3) does not authorize a cause of action against nonviolators.**

As the court of appeals noted, Ameritech's position before that court was "that *Salomon violated* [ERISA] by engaging in a transaction prohibited by § [406]" and that "[*t*]*herefore* [Ameritech] may seek 'appropriate equitable relief' ... against Salomon under § [502(a)(3)]". JA 347 (emphasis added). Ameritech's claim that "Salomon violated" is answered in Point I.A.1, *supra*. Now, in Ameritech's merits brief before this Court, Ameritech advances an additional claim. Ameritech argues that under § 502(a)(3) a court may hold a nonfiduciary party-in-interest liable — even if it did *not* violate § 406 (or any other ERISA Title I provision) and even if it did *not* engage in wrongdoing — in order to "redress" a violation by *someone else*. *See* PB 13, 15-18, 20, 28-31.

Ameritech thus recasts § 502(a)(3) as expanding the class of persons who may be liable and thereby establishing what might aptly be called "nonviolator liability". To support this nonviolator-liability claim, Ameritech now argues that "the answer to the question presented ... does *not* ultimately depend on whether a non-fiduciary party in interest ... violates § 406(a)". PB 20 (emphasis added). This is the opposite of Ameritech's position in the court of appeals, where it

equitable remedy when sought in a case in equity, and a legal remedy when sought in a case at law". PB 29 n.14 (citing, *inter alia*, *Reich* v. *Continental Cas. Co.*, 33 F.3d 754, 755-56 (7th Cir. 1994)). *Continental Casualty* explained that a suit seeking restitution from a nonfiduciary would "normally be a suit at law", but the case before it had a "special wrinkle" — the equitable theory of aiding and abetting a fiduciary breach. *See id.* Ameritech fails to articulate any theory under which a hypothetical "direct" claim against a nonfiduciary party-in-interest for its own "violation" of § 406 would be "a case in equity". In fact, that claim would be legal. It posits a direct statutory tort by a nonfiduciary. Instead of defending the supposed equitable nature of the "direct" claim it presented to the court of appeals, Ameritech now attempts to interject a separate, purportedly equitable claim against Salomon to redress *fiduciary NISA's* violation of § 406. But as discussed in Point I.A.2, this claim is not legally viable and in any event has been waived.



argued that the question "depends *entirely* on the meaning of § [406(a)]". Brief of Appellees at 18 (emphasis added).

Ameritech's nonviolator-liability claim cannot logically be confined to party-in-interest liability for prohibited transactions — § 502(a)(3) does not mention parties-in-interest, or prohibited transactions, or even, specifically, a *fiduciary* violation. Rather, under Ameritech's theory, *any person* could be sued for "equitable relief" under § 502(a)(3) to "redress" *some other person's* violation. As shown below, there is no merit to this claim and, in any event, it has been waived.

**a. There is no statutory basis for holding *non*violators liable to redress someone else's violation.** Ameritech's nonviolator-liability claim ignores the basic requirement that there be a substantive basis for *liability* of a party before *relief* will be awarded against it. The text of § 502(a)(3) does not provide a basis for holding *non*violators liable for *other* persons' violations. Thus, § 502(a)(3) does not prohibit any conduct or impose any duties: It contains no language such as the familiar "shall not" used elsewhere in ERISA, such as in § 406. Nor does § 502(a)(3) expressly impose civil liability: Phrases such as "shall be liable" (§ 405(a)) and "shall be personally liable" (§ 409(a)) are nowhere to be found in § 502(a)(3).

Rather, § 502(a)(3) simply permits specified parties to bring suit for particular *relief*; in the case of § 502(a)(3)(B)(i) relief is *limited* to "other appropriate equitable relief" "to redress" violations of Title I or the terms of a plan. To determine what violations may be redressed by suit under § 502(a)(3) one must look elsewhere: to *other* provisions of Title I or to the terms of the plan. As the Seventh Circuit observed, § 502(a)(3) "only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act". JA 349. Ameritech attempts to turn § 502(a)(3) into something it is not — a provision imposing substantive *duties and liabilities*.

This Court has recognized that the threshold issues of duty and liability are separate and distinct from the nature of the relief sought. As stated in *Mertens*: § 502(a)(3) "does not ... authorize 'appropriate equitable relief' *at large*, but only 'appropriate equitable relief' for the purpose of redress[ing any] violations or ... enfor[cing] any provisions of ERISA or an ERISA plan." 508 U.S. at 253-55 & n.5 (questioning whether any "remediable wrong has been alleged" since "no provision explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty") (emphasis added) (internal quotation marks omitted); *see also Central Bank*, 511 U.S. at 175 ("While plaintiffs had a remedy against nonfiduciaries at common law, that was because 'nonfiduciaries had a *duty* to the beneficiaries not to assist in the fiduciary's breach.' No comparable duty [is] set forth in ERISA") (emphasis added) (quoting *Mertens*, 508 U.S. at 255 n.5); Point I.D, *infra*.[7]

Ameritech argues that Congress did not restrict who may be sued under § 502(a)(3). *See* PB 17. But the fact that § 502(a)(3) only identifies who may be a *plaintiff* does not mean Congress intended that anyone — including *non*violators — could be held liable as *defendants*. Rather, to determine who can be held liable one must consult the other provisions of Title I (or the terms of a plan) imposing duties and liabilities.

Ameritech also points to the use of the term "any" in § 502(a)(3) ("*any* act or practice which violates *any* provision of this title"). *See* PB 16-17. But "any" means only that any violation of Title I or the terms of a plan can be the pred-

[7] *See also Lockheed* v. *Spink*, 517 U.S. 882, 888-91 (1996) (since *defendant* Lockheed did not act in a fiduciary capacity, "there can be no violation of § 406(a)(1) to warrant relief" under § 502(a)(3)); *Peacock* v. *Thomas*, 516 U.S. 349, 353 (1996) (claim against nonfiduciary who allegedly siphoned assets from fiduciary, seeking to recover unpaid judgment previously entered against such fiduciary for breach of fiduciary duties, does not arise under § 502(a)(3)).



icate for suit. It does not mean that when a fiduciary violates a provision of Title I (or the terms of a plan), relief may be obtained against *someone else* — a nonviolator.

Ameritech's reliance on *Varity* v. *Howe*, 516 U.S. 489 (1996), is misplaced. In *Varity*, the defendant was a fiduciary sued for its *own* violation of § 404(a) (*id.* at 503, 506, 508); *Varity* does not suggest that nonviolators can be sued under § 502(a)(3) to redress someone else's violation. It is one thing to view § 502(a)(3) as a "catchall" provision authorizing suits against persons subject to express duties and liabilities provided elsewhere in Title I. But it is quite a different matter to assume that Congress would have set forth express provisions for duties and liabilities with painstaking detail throughout Title I, yet intended that § 502(a)(3) impliedly create other duties and liabilities on a "catchall" basis.

The common-sense interpretation of § 502(a)(3) as authorizing specified plaintiffs to seek "appropriate equitable relief" against *violators* of provisions that appear elsewhere in Title I does not render §§ 502(a)(3) and (a)(5) "superfluous". *See* PB 17 n.8. As *Varity* itself demonstrates, there are suits against fiduciaries that can be brought under (a)(3) or (a)(5), but not (a)(2). And nonfiduciaries may also be sued under §§ 502(a)(3) and (a)(5) — if they commit an "act or practice" that "violates" Title I or the terms of a plan.[8]

**b. Section 502(a)(3) does not incorporate a body of common law under which a nonfiduciary party-in-interest could be liable as a nonviolator.** Ameritech argues that the phrase "appropriate equitable relief" incorporates into ERISA principles of the common law of trusts. *See* PB 18,

[8] The cases abound. For examples of actions against nonfiduciaries for Title I violations *not* involving prohibited transactions, see, *e.g.*, *Nero* v. *Industrial Molding Corp.*, 167 F.3d 921, 927, 931 (5th Cir. 1999); *American Fed'n* v. *WCCO Television, Inc.*, 934 F.2d 987, 990 & n.3 (8th Cir. 1991). The § 502(a)(3) cases the United States cites (USB 12 n.3) are examples of actions for violation of the terms of a plan.

28-31. But just last Term, this Court unanimously admonished that "because ERISA is a comprehensive and reticulated statute and is enormously complex and detailed, it should not be supplemented by extra-textual remedies, such as the common-law doctrines advocated by respondents." *Hughes Aircraft* v. *Jacobson*, 525 U.S. at 447 (internal quotation marks omitted). The Court continued: "Although trust law may offer a 'starting point' for analysis in some situations, it must give way if it is inconsistent with 'the language of the statute, its structure, or its purposes.'" *Id.* (quoting *Varity*, 516 U.S. at 497).

The phrase "appropriate equitable relief" — which *limits* the type of *relief* available in suits brought under § 502(a)(3) (*see Mertens*, 508 U.S. at 255-63) — does not purport to import into ERISA *duties and liabilities* existing under the common law of trusts, much less any supposed doctrine imposing liability upon nonviolators for someone else's violation. With respect to fiduciaries, Congress did not simply sweep duties and liabilities under the common law of trusts into ERISA through general language in § 502 identifying available remedies. Rather, Congress specified what conduct by fiduciaries would generate liability, including liability arising from participation in another fiduciary's breach. *See, e.g.*, §§ 404, 405, 406, 409. In a few cases, duties and prohibitions in Title I are expressly extended beyond fiduciaries (*e.g.*, § 412). It would be wholly illogical (as well as unsupported by the statute) to think that Congress intended to sweep into ERISA — through language in § 502(a)(3) identifying equitable *relief* as an available *remedy* — whatever other duties and liabilities of nonfiduciaries (or even fiduciaries, for that matter) that may exist under the common law for which equitable relief could serve as a remedy. Such a reading would turn a limitation on relief into an expansion of liability.



Thus, even if a duty and liability of nonfiduciary counterparties hypothetically did exist under the common law of trusts, there would be no justification for implying it into ERISA. As stated in *Mertens*: "The authority of Courts to develop a 'federal common law' under ERISA ... is not the authority to revise the text of the statute." 508 U.S. at 259.[9]

In any event, the common law of trusts never recognized the cause of action Ameritech advances. Ameritech fails to distinguish the issue of (i) whether a liability exists under applicable substantive principles from (ii) the "relief" *if* a substantive liability exists. *See, e.g.*, Dobbs, *Law of Remedies* § 4.1(1) at 552 (2d ed. 1993). Cases and authorities concerning available remedies where a substantive liability exists do not address the question of whether a substantive liability would exist under the common law of trusts here, which it would not.

*First*, under the common law of trusts, if the trustee did not commit a breach, a transferee of trust property had no liability. *See Restatement (Second) of Trusts* § 283 (1959); IV Scott & Fratcher, *Law of Trusts* § 283 (4th ed. 1989). A trustee's causing the trust to enter into a transaction with a service provider to the trust was not a breach of duty under the common law; *a fortiori* the service provider could have no liability for entering into the transaction. Indeed, under the common law, there was no blanket prohibition against trustees causing trusts to deal with parties related *even to themselves*. Rather, a trustee's sale of trust property to a party *related to the trustee* was not a breach unless the trustee was improperly influenced by his relationship to the

[9] Cases such as *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101 (1989) did not import common law principles to establish duties, liabilities and causes of action not expressed in ERISA. *Firestone*, for example, involved a suit for benefits; the plan established substantive rights and § 502(a)(1)(B) provided an express cause of action. In *Health Cost Controls* v. *Washington*, 187 F.3d 703 (7th Cir. 1999), *cert. denied*, 120 S. Ct. 979 (2000), substantive rights arose under the plan, and the suit was one to redress violations of, or to enforce, the terms of the plan.

purchaser such that he sold the property on less favorable terms, or "otherwise abused his discretion in making the sale". *Restatement (Third) of Trusts (Prudent Investor Rule)* § 170 cmt. e, at 196 (1990); *see also*, IIA Scott & Fratcher, § 170.6, at 334-35. The provisions of § 406 regulating a fiduciary's ability to transact with certain parties with relationships to the plan, and the defined term "parties-in-interest", are entirely statutory creations.

Ameritech thus proposes a hybrid cause of action that combines (i) substantially broader prohibitions under ERISA against conduct by *fiduciaries* with (ii) supposed common-law grounds upon which nonfiduciaries may be liable for participation in transactions that *do* involve a fiduciary breach under the common law. On Ameritech's theory, a cause of action exists against a nonfiduciary party-in-interest even though ERISA does *not* expressly impose duties and liabilities upon the nonfiduciary *and* the nonfiduciary would have *no* duties and liabilities under the common law.

*Second*, the common law in any event never recognized anything like the strict-liability cause of action that Ameritech posits. Rather, only culpable participation in a violation of duty was actionable. *See*, *e.g.*, *Mertens*, 508 U.S. at 254, 261-62 (referencing "knowing participation" liability under common law of trusts); IV Scott & Fratcher, § 326.1, at 293-95 (seller of property to a trust can be held liable if he "has actual knowledge that the trustee is committing a breach"). Ameritech asserts that "restitution" is not "limited to wrongdoers". *See* PB 30. But again Ameritech confuses the separate issues of (i) liability and (ii) "relief" *if* liability exists. None of Ameritech's authorities states that a third-party who sells property to a trust can be held liable for a trustee's breach of trust absent culpable knowledge of the trustee's breach. *Compare*, *e.g.*, V Scott & Fratcher, § 462.2 (recognizing there must be an underlying substantive liability for unjust enrichment, such as in cases of fraud, mistake or a



gratuitous transfer made in breach of trust) *with* IV Scott & Fratcher, § 326.1, cited above.[10]

As Ameritech acknowledges in a footnote, there is no claim at common law against "bona fide" purchasers for value, *i.e.*, non-gratuitous transferees that did not know of the trustee's breach. *See* PB 30 n.15. Salomon gave value here — even if one accepts *arguendo* the claim that the Fee Agreements "proved to be nearly worthless" (PB 8). *See Restatement (Second) of Trusts* § 298 ("If money is paid or other property is transferred or services are rendered as consideration for the transfer of trust property, the transfer is for value"); *id.* cmt. i. And even if one hypothesizes that *Salomon* "failed to make timely disclosure" (PB 8) *to* APT's fiduciaries, that would not constitute the requisite knowledge by Salomon of a breach of a common-law trust duty *by* APT's fiduciaries.

Plainly there is no warrant for *implying* duties and liabilities into ERISA's "carefully crafted and detailed enforcement scheme" (*Mertens*, 508 U.S. at 254) that (for multiple reasons) do not exist even under the common law.

**c. Ameritech waived any claim that Salomon can be held liable even if Salomon did *not* violate § 406.** Ameritech's nonviolator-liability claim is a creation of its Supreme Court merits brief. It is not pled in Count II (the only claim before this Court), was never presented to the court of appeals and was not advanced — at least not explicitly and directly — in the petition for certiorari.

The district court correctly understood Count II to rest upon allegations that *Salomon* had violated § 406(a) and was

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[10] The United States recognizes that *Mertens*, 508 U.S. at 255 n.5, contradicts its assertion that "restitution from a transferee of trust property was not based on the nonfiduciary's *own* breach". USB 23. And the *Strauss* and *Cahn* cases involved knowing-participation in fiduciary breach. *See* 63 F.2d 174, 175-78 (4th Cir. 1933); 62 A. 819, 821-22 (Md. 1906). Bogert & Bogert, § 901 deals with the trust beneficiary's "Right that Third Party Shall Not Knowingly Participate in a Breach of Trust."

being sued under § 502(a)(3) to remedy *Salomon's own* violation. *See, e.g.*, JA 305 ("whether Salomon is a proper defendant" turns "on whether it violated ERISA"); JA 311, 320, 323. Count II makes no allegation that someone *other than* Salomon violated § 406 and that, therefore, Salomon could be liable even if it did *not* violate § 406. *See* JA 39-41. By contrast, Count *III* was premised upon violation of § 406 by someone else — NISA. *See* JA 42. However, Count III was dismissed in the June 1996 order and was thereafter waived when Ameritech did not contest on appeal the dismissal of Count III (or any other aspect of that order). *See* Resp. Opp. 5-10. On Ameritech's nonviolator-liability claim, liability of the nonviolator (Salomon) is dependent upon whether the fiduciary (NISA) violated § 406(a) and it is assertedly not even necessary to show that Salomon engaged in wrongdoing or had knowledge of NISA's alleged violation. *See* PB 13, 15-18, 20, 28-31. This is at best a more extreme variant of the previously dismissed Count III secondary-liability claim.[11]

[11] Thus, the distinction between direct Rule 10b-5 claims and dependent secondary-liability claims (as to which *Central Bank* rejected a private right of action) has turned on whether proof of a violation by another is required: (1) "primary violators" could be sued for their own misconduct irrespective of conduct of others, but (2) a dependent secondary claim had required the existence of a "primary violation." *See, e.g., Central Bank*, 511 U.S. at 194 ("the existence of a primary violation" was an element of the 10b-5 aiding-and-abetting claim recognized in the lower courts); Loss & Seligman, *Securities Regulation*, Chap. 11c at 4479 (3d ed. 1989) (same).

As noted, Ameritech now asserts that a defendant can be liable even if it did *not* violate ERISA or engage in wrongdoing. By contrast, pre-*Mertens* secondary-liability cases required proof that the nonfiduciary party-in-interest knew that the fiduciary violated § 406. *See* p. 48, *infra*. And proof that the defendant provided substantial assistance to the violator typically is an additional requirement for secondary liability. *See, e.g., Central Bank*, 511 U.S. at 168 ("substantial assistance given to the primary violator by the aider and abettor" was an element of the 10b-5 aiding-and-abetting claim that the Court rejected); *Restatement (Second) of Torts* § 876(b) (1979).



Furthermore, in the court of appeals, Ameritech expressly relied on the claim that Salomon was liable as a violator, stating that "Salomon's argument that there is no private right of action under [§ 502(a)(3)] to redress *party in interest violations* of § [406] *depends entirely* on the meaning of § [406(a)]." Brief of Appellees at 18 (emphasis added); *see id.* at 14 ("thrust" of Count II is "that Salomon, a party-in-interest ... violated ... § 406(a)...."), 15, 17, 20, 22, 28, 29, 33, 35, 37 ("'Salomon's liability is premised on a direct violation of §[406]'"), 39. And, as noted, the court of appeals understood Ameritech's claim to turn on whether "*Salomon violated* [ERISA] by engaging in a transaction prohibited by § [406]". JA 347 (emphasis added); *see also* JA 348 ("The 'act' alleged here is *Salomon*'s participation in a transaction prohibited by § [406]") (emphasis added).

Salomon's opposition to certiorari explicitly objected that Ameritech had waived its secondary-liability claim. *See* Resp. Opp. pp. 5-10. On reply, Ameritech did not dispute its waiver, but argued that this was no reason to deny certiorari, stating in effect that there was no serious secondary-liability argument to be made. *See* Pet. Reply 2-3, 6 n.5. Ameritech in a footnote suggested that the "question presented" was general enough to "fairly include[ ]" a secondary-liability theory. *Id.* at 3 n.2. But Ameritech cannot use its formulation of the "question presented" to this Court to relieve itself of its prior waiver in the court of appeals where it (i) failed to contest the dismissal of Count III, its secondary-liability count, and (ii) relied solely on a claim that *Salomon* violated § 406(a). Moreover, the formulation of a question presented must be read in conjunction with what the underlying claim is; here, a claim that Salomon was liable as a violator.

The Court should deem Ameritech's nonviolator-liability claim waived and decline to consider it. *See* cases cited in Resp. Opp. p. 7; *see also, e.g., Pennsylvania Dep't of Corrections* v. *Yeskey*, 524 U.S. 206, 212-13 (1998). A finding of waiver is especially appropriate in light of the far-reaching

implications of Ameritech's nonviolator-liability theory. *See South Cent. Bell Tel. Co.* v. *Alabama*, 526 U.S, 160, 170-71 (1999).

### 3. Ameritech's arguments based on statutory context lack merit.

None of the other statutory provisions Ameritech relies upon (PB 22-27) are Title I provisions that impose a duty upon nonfiduciary parties-in-interest, breach of which could constitute a violation of Title I and give rise to civil liability.

**Section 408.** That § 408 authorizes exemptions for "any fiduciary or transaction, or class of fiduciaries or transactions" does not indicate that it is the *transaction* that is prohibited. Rather, § 408 indicates that Congress chose to permit the Secretary of Labor to exempt either particular fiduciaries or particular transactions (regardless of what fiduciaries are involved). Other clauses in § 408(a) and § 408(c) likewise refer only to fiduciaries: "[a]n exemption ... shall not relieve a *fiduciary* ..."; "[n]othing in section 406 ... shall be construed to prohibit any *fiduciary*..." (emphasis added). That these clauses of § 408 refer only to fiduciaries underscores that § 406 prohibits conduct only by fiduciaries.

**Section 502(i).** Section 502(i) provides for *administrative* assessment of penalties by the Secretary of Labor in the case of a prohibited transaction "by a party in interest" — a penalty of up to 100% may apply if the transaction is not "corrected". A separate provision, § 502(a)(6), provides express authority for suit to collect the penalty. Section 502(i) does *not* provide for duties or liabilities enforceable in a civil cause of action. In any event, § 502(i) does not apply to tax-qualified plans such as the plans involved here (*see* PB 35) and thus cannot conceivably create any duty here. But what §§ 502(a)(6) and 502(i) do demonstrate is that Congress knew how to create an express remedy that would extend to nonfiduciary parties-in-interest when it wanted to do so.



**Section 502(l).** Section 502(l) was added in 1989, 15 years after enactment of ERISA, to provide additional civil penalties on violations by fiduciaries. Neither § 502(l) nor the "legislative history" surrounding it (even if accurately depicted) can have any bearing on what Congress provided 15 years earlier in § 406. *See, e.g., South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 355 (1998). In any event, this Court has specifically rejected similar reliance by a private litigant upon § 502(l). *See Mertens*, 508 U.S. at 259-61. Since § 502(l)(1)(B) would permit assessment of civil penalties upon co-fiduciaries who are liable under § 405(a) for knowing participation in another fiduciary's breach, one does not need to adopt the position that a cause of action exists against *non*fiduciaries in order to give meaning to § 502(l)(1)(B). *Id.* at 260-61. In fact, the distinction between the liability of a fiduciary "who breaches" (§ 409(a)) and a co-fiduciary who is liable under § 405(a) because it "participates knowingly in" the breach, is echoed in the distinction in § 502(l)(1) between "breach of fiduciary responsibility" and "knowing participation in" the breach. And § 502(l)(4) could apply if Fiduciary X violated § 406(a) by causing a plan to enter into a nonexempt transaction with Fiduciary Y, who knowingly participated in Fiduciary X's breach. If Fiduciary Y paid a § 502(i) penalty or § 4975 tax, § 502(l)(4) would provide an offset against its § 502(l)(1)(B) penalty.

**IRC § 4975 (ERISA Title II, § 2003).** Under § 4975, the IRS may impose excise taxes on certain parties-in-interest (including certain nonfiduciaries) who participate in nonexempt prohibited transactions with tax-qualified plans — a 100% tax applies if the transaction is not "corrected". But IRC § 4975 (ERISA § 2003) is part of *Title II (not* Title I) of ERISA. *See* table of contents of P.L. 93-406, 3 *Legislative History of ERISA* ("Leg. Hist.") 4836-38. Thus, "violations" of § 4975 cannot be the predicate for a civil action under § 502(a)(3), which is limited to violations of Title I.

*C.I.R.* v. *Keystone Consol. Indus.*, 508 U.S. 152, 160 (1993), a tax decision under IRC § 4975, does *not* discuss which parties have duties under § 406 that may give rise to civil liability. That "Congress' goal [in § 406] was to bar categorically a transaction that was likely to injure the pension plan" (*id.* at 160) says nothing about *whose* conduct is prohibited by § 406 or which parties may violate a Title I provision and be subject to civil liability.

Section 4975(h) merely provides for administrative coordination between the Secretaries of Labor and Treasury, giving Labor an "opportunity to obtain a correction ... or to comment on the imposition of [the] tax". Ameritech's § 4975(h) argument ignores the "or to comment" clause and assumes, *inter alia*, that the *only* means by which the Secretary of Labor could ever seek a correction of *any* transaction would be by civil suit against a *non*fiduciary party-in-interest. In some cases, including cases in which the counterparty is another fiduciary, Labor might seek correction by proceeding only against fiduciaries. Other prohibited transactions may not involve receipt of plan assets by a nonfiduciary at all (*e.g.*, §§ 4975(c)(1)(E) and (F)). And even as to nonfiduciaries, Labor could seek correction *administratively* through use of the threat of IRS assessment of excise taxes *or* at least "comment". That § 4975(h)'s reference to "opportunity to obtain a correction" does not have the significance Ameritech ascribes to it is underscored by the fact that the parallel provision in ERISA § 3003(a) provides only that "in accordance with [§ 4975(h)]" Treasury shall "afford the Secretary [of Labor] an opportunity to comment."

**Section 3003 (ERISA Title III).** Section 3003(c) does not attempt to define who can violate § 406; the text of § 406 does that. Rather, § 3003(c) appears in ERISA Title III and concerns transmission of information by the Secretary of Labor to the Secretary of the Treasury. Since the reports go to Treasury, it is not surprising that § 3003(c) uses the terms "party-in-interest or disqualified person" — persons who (in



appropriate cases) may be subject to the excise tax administered by Treasury. But § 3003(c) qualifies those terms with the phrase "is violating section 406". In the universe of parties-in-interest and disqualified persons, there are some who can violate § 406 — namely, fiduciaries who cause a plan to engage in a prohibited transaction (all fiduciaries are by definition parties-in-interest and disqualified persons, *see* § 3(14)(A); IRC § 4975(e)(2)(A)). Section 3003(c) requires Labor to report these violators. Indeed, a fiduciary who deals with plan assets for his own account in violation of § 406(b)(1) must be reported as a "party-in-interest or disqualified person [who] is violating section 406" even if no nonfiduciary is involved.

**4. ERISA's explicit provisions for liabilities and sanctions underscore the absence of the posited cause of action.**

Congress's choice to impose (i) civil liability on breaching fiduciaries (§ 409(a)) and on participating fiduciaries (§ 405(a)), and (ii) excise taxes under § 4975 or penalties under § 502(i) against certain parties-in-interest, "only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking." JA 350.

This Court has held that where a statutory scheme expressly provides alternative methods of addressing allegedly prohibited conduct, "it cannot be assumed that Congress intended to authorize by implication additional judicial remedies for private citizens suing under the statute." *Meghrig* v. *KFC Western*, 516 U.S. 479, 488 (1996) (internal quotation marks omitted). Rather, "'[i]t is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it.'" *Id.*; *accord, e.g.*, *Karahalios* v. *Nat'l Fed'n of Fed. Employees*, 489 U.S. 527, 533 (1989); *Russell*, 473 U.S. at 147; *Northwest Airlines, Inc.* v. *Transport Workers Union*, 451 U.S. 77, 93-94, 97 (1981) ("The presumption that a remedy was deliberately

omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.").

The United States argues that the "primary focus" of the excise-tax and penalty provisions is "obtaining restitution to a plan from a nonfiduciary party in interest", and that obtaining such redress "takes priority over assessing against the party in interest a civil penalty or tax." USB 20-21. But if the posited causes of actions existed, a plan fiduciary (or the Secretary under § 502(a)(5)) could sue to *compel* restitution. The excise-tax and penalty provisions would then be unnecessary as a means of forcing restitution. The United States' position requires one to assume that Congress intended that the posited causes of actions be available (but *neglected* to say so expressly), yet did articulate expressly and in detail excise-tax and penalty provisions whose "primary focus" — obtaining restitution to the plan — would be redundant of the causes of actions this Court is asked to infer.

### B. The legislative history confirms what the statutory text reflects: Congress made a deliberate choice *not* to provide the posited cause of action.

**1. Congress designed the prohibited-transaction rules to regulate fiduciary conduct.** From the outset in the 93rd Congress, the original pension-reform bills included prohibited-transaction provisions to complement ERISA's affirmative fiduciary duties and establish "a twofold duty on every fiduciary". *See, e.g.*, H.R. Rep. No. 93-533, at 13 (1973), 2 Leg. Hist. 2360; S. Rep. 93-127, at 30 (1973), 1 Leg. Hist. 616. The Department of Labor's explanatory statement to its proposed pension-reform bill described the prohibited-transaction rules as being part of:

> a *twofold duty on every fiduciary*: to act in his relationship to the plan's fund as a prudent man in a similar situation ... and to act solely in the interest of the participants and beneficiaries of the plan; *that is, to refrain from involving himself in situations or transactions (especially transactions with known parties in interest) where his personal interests might conflict* with the interests of the participants and beneficiaries.... Thus, section 14(b)(1) sets out the prudent man standard and the attendant affirmative duties.... *There follows a list of proscriptions (section 14(b)(2)) which represent the most serious types of fiduciary misconduct....* (119 Cong. Rec. 12,076 (1973), 1 Leg. Hist. 275-76.)[13]



**2. Congress rejected the Senate's proposals to impose civil liability upon parties-in-interest and authorize suits against persons who receive plan assets in violation of ERISA.** The Senate Finance Committee decided to propose that parties-in-interest be subject to civil liability for engaging in prohibited transactions. To that end, the Finance Committee crafted an express provision for party-in-interest liability. It provided that "[a]ny party in interest who participates in a [prohibited] transaction ... knowingly, or with reason to know that the transaction was [prohibited], shall be personally liable" for damages ("to make good to the fund any losses") and for disgorgement ("to pay to the fund any profits realized by him from such transaction"). JA 274-75.

Ultimately, in 1974, the House and Senate passed competing bills numbered H.R. 2. The House bill limited liability for engaging in prohibited transactions to fiduciaries. *See* JA 277-81. By contrast, the Senate bill included the provision to impose civil liability for damages and disgorgement on parties-in-interest. *See* JA 275, 281. The two bills also differed in their enforcement provisions. Unlike the House provision, the Senate enforcement provision authorized civil

[13] Other references to the precursors of § 406 likewise speak only of prohibiting fiduciaries — as opposed to parties-in-interest — from engaging in specified transactions. *See, e.g.*, H.R. Rep. No. 93-1280, at 294 (1974), 3 Leg. Hist. 4561; H.R. Rep. No. 93-533, at 21 (1973), 2 Leg. Hist. 2368; 120 Cong. Rec. 3980 (1974), 2 Leg. Hist. 3300; 119 Cong. Rec. 30,009 (1973), 1 Leg. Hist. 1614 (Remarks of Sen. Ribicoff); Summary of Major Provisions of S. 4, 1 Leg. Hist. 200.

actions against "*any person* who has transferred *or received* any of the assets of a plan". *Compare* JA 280-81 *with* JA 275-76 (emphasis added). Thus, the relief that Ameritech seeks here is what hypothetically might have been available to it under the Senate bill. Additionally, the Senate bill imposed a two-tier excise tax on disqualified persons (defined similarly to parties-in-interest) that engage in prohibited transactions. The House bill did not contain an excise-tax provision. *See, e.g.*, 3 Leg. Hist. 4267.

The Conference Committee reported out a Conference substitute of H.R. 2 that Congress enacted as ERISA. Regarding party-in-interest liability, the Conference Committee staff recommended that the conferees "adopt the approach of the House bill and *not provide civil liability for parties-in-interest*". JA 281-82, 3 Leg. Hist. 5259 (emphasis added). Following this recommendation, the conferees dropped the Senate's party-in-interest liability provision. *See* P.L. 93-406, Title I, Part 4, 3 Leg. Hist. 4881-97. The Conference substitute enforcement provisions (including what became §§ 502(a)(3) and (a)(5)) also generally conformed to the form and substance of the provisions in the House bill, as discussed below. Specifically, the Conferees did *not* adopt the Senate's very different proposal to permit civil actions against "any person who has ... received ... assets of a plan". *See* pp. 31-32, *infra.* However, as part of overall compromises, the Conferees did accept the Senate's provisions for excise taxes and also added a provision for penalties applicable to certain parties-in-interest. *See* P.L. 93-406, §§ 502(i), 2003, 3 Leg. Hist. 4899-4900, 4978-86.

The Conference Report contrasts the Conference substitute with the Senate bill. Under the Senate bill, "[f]iduciaries (*and parties-in-interest*) [would] be personally liable under the labor provisions". H.R. Rep. No. 93-1280 ("Conf. Rep."), at 295 (1974), 3 Leg. Hist. 4562 (emphasis added). But under the Conference substitute, only fiduciaries would be subject to civil liability under Title I:



> *Fiduciary responsibility rules, in general*
>
> The conference substitute establishes rules governing the conduct of plan *fiduciaries* under the *labor* laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "*parties in interest*" under the labor provisions) with respect to the plan under the *tax* laws (title *II*). This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law *to govern the conduct of fiduciaries*. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules ....
>
> *Civil liability*
>
> *Fiduciaries.* — Under the labor provisions (but not the tax provisions) of the substitute, a fiduciary who breaches the fiduciary requirements of the bill is to be personally liable for any losses to the plan resulting from this breach....
>
> *Party-in-interest.* — A party-in-interest who engages in a prohibited transaction with respect to a plan that is not qualified ... under the Internal Revenue Code may be subject to a civil penalty of up to 5 percent of the amount involved in the transaction. If the transaction is not corrected after notice from the Secretary of Labor, the penalty may be up to 100 percent of the transaction.

Conf. Rep. at 295, 320, 3 Leg. Hist. 4562, 4587; *see also id.* at 307, 3 Leg. Hist. 4574 ("Under the labor provisions a fiduciary will be liable for losses to a plan from a prohibited transaction in which he engaged...."); *id.* at 327, 3 Leg. Hist. 4594 ("Under the conference agreement, civil actions may be brought ... for relief from breach of fiduciary responsibility").

When the Senate Conferees explained the Conference substitute to their colleagues, their explanations yet again underscored the Conferees' decision to subject nonfiduciary parties-in-interest to potential excise taxes or penalties only. Thus, Senator Williams told the Senate that:

> Under the conference substitute, enforcement of the fiduciary provisions would primarily lie with the Secretary of Labor who would be empowered to bring civil actions to redress or restrain violations on the part of *fiduciaries*. He is also authorized to impose civil *penalties* on *parties in interest* who participate in prohibited transactions with welfare plans which are not subject to the tax qualification provisions of the Internal Revenue Code. However, *the Internal Revenue Service would have responsibility for dealing with those who are "disqualified persons"* — similar to the parties in interest defined in the labor portion of the conference substitute — with authority to impose *excise taxes* on violators.

120 Cong. Rec. 29,933 (1974), 3 Leg. Hist. 4745 (emphasis added); *see also id.* at 29,954, 3 Leg. Hist. 4803 (Remarks of Sen. Nelson).

**3. Ameritech's legislative-history arguments lack merit.** Ameritech takes out of context the Conference Report statement that "the conference substitute prohibits plan fiduciaries *and parties-in-interest* from engaging in a number of specific transactions". *See* PB 39-40. The statement appears in section "V" of the Conference Report, which (as the section heading makes clear) discusses *both* ERISA Title I provisions *and Title II tax provisions*. *See* Conf. Rep. at 294, 3 Leg. Hist. 4561. And the paragraph from which Ameritech excerpts goes on to say:

> Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. This corresponds to the traditional focus of trust law and of *civil enforcement of fiduciary responsibilities through the courts*. On the other hand, the tax provisions (title II) focus on the disqualified person.... (Conf. Rep. at 306, 3 Leg. Hist. 4573, emphasis added).



Taken in context, then, the statement that the Conference substitute "prohibits" parties-in-interest from engaging in prohibited transactions at most suggests that IRC § 4975 (in Title II) — as distinct from § 406 (in Title I) — imposes a "prohibition" on nonfiduciary parties-in-interest. But that proposition cannot advance Ameritech's case because § 502(a)(3) is limited to violations of Title I of ERISA.

In fact, the legislative history repeatedly evidences Congress's intent to prohibit only fiduciary conduct in § 406, as the statute states. Thus, the Conference Report explains: "The labor provisions ... provide general standards of conduct for *fiduciaries*, and make certain specific transactions 'prohibited transactions' which plan *fiduciaries* are not to engage in." Conf. Rep. at 295, 3 Leg. Hist. 4562 (emphasis added). And in presenting the conference substitute to the Senate, Senator Williams stated: "The bill prohibits *fiduciaries* from engaging in transactions involving the transfer of assets between the plan and parties in interest...." 120 Cong. Rec. 29,933 (1974), 3 Leg. Hist. 4743 (emphasis added); *accord*, *e.g.*, 120 Cong. Rec. 29,954 (1974), 3 Leg. Hist. 4803 (Remarks of Sen. Nelson); *see also* pp. 26-27 & n.13, *supra*.

Ameritech argues that "§ 502(a)(3) and (a)(5) originated in the Senate bill[ ]" and that the "other appropriate equitable relief" clause supposedly reflected a decision by the Conferees "to insert language from the Senate bill". PB 41. These assertions are not supported by what Ameritech cites and are wrong. In reality, §§ 502(a)(3) and (a)(5) as enacted were based on the House bill. *Compare* House bill § 503(e)(3), JA 280-81, 3 Leg. Hist. 4047 *with* Senate bill §§ 692, 693, JA 275-76, 3 Leg. Hist. 3815-17. The sentence on page 327 of the Conference Report, which immediately

precedes the sentence Ameritech quotes from twice (PB 41, 43), expressly states: "The conference agreement generally conforms to the provisions as passed by the *House*." Conf. Rep. at 327, 3 Leg. Hist. 4594 (emphasis added).[14]

The phrase "other appropriate equitable relief", added by the conferees in a new clause (B) in § 502(a)(3), remained tied to the phrase "act or practice which violates any provision of this title" in clause (A) — the precise language used in the House bill. *Compare* § 503(e)(3), JA 280-81, 3 Leg. Hist. 4047, *with* § 502(a)(3), JA 254. By contrast, the Senate proposal for civil actions against "any person who has ... received ... assets of a plan" (JA 275-76) was *not* enacted. It makes no sense to think that, by adding the phrase "other appropriate equitable relief", Congress intended to subject to civil liability a party who did *not* violate a Title I provision or the terms of a plan — much less to import into ERISA through the back door *rejected* Senate provisions imposing civil liability, for damages *and disgorgement*, upon parties-in-interest".[15]

Obviously Congress did not "inadvertent[ly] omi[t]" civil liability for parties-in-interest, or "simply forg[e]t" to provide it. *See Russell*, 473 U.S. at 146. "Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded...." *I.N.S.* v. *Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987).

[14] This sentence concerned what became § 502(a)(5). The language of § 502(a)(3) parallels that of § 502(a)(5).

[15] A 1973 *Senate* Report reference to constructive trusts as a potential remedy (*see* PB 18 n.9, 29; USB 22) obviously cannot suggest that in 1974 the Conferees intended to make constructive trust available as a remedy against nonfiduciary parties-in-interest, whom the Conferees had determined would *not* have civil liability.



### C. Inferring the posited cause of action would interfere with Congress's policy choices and raise separation-of-powers concerns.

In this Court, Ameritech seeks to undo the legislative compromise to subject nonfiduciary parties-in-interest to excise taxes and penalties (in appropriate cases), but not civil liability. But this Court has been clear that it will "respect the 'policy choices reflected in the inclusion of certain remedies and the exclusion of others'" in ERISA. *Varity* v. *Howe*, 516 U.S. at 515 (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 54 (1987)). Thus, "[t]he federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Russell*, 473 U.S. at 145 (1985) (internal quotes omitted). This approach recognizes that "the authority to construe a statute is fundamentally different from the authority to fashion a ... remedy which Congress has decided not to adopt.... The judiciary may not, in the face of such comprehensive legislative schemes, fashion ... remedies that might upset carefully considered legislative programs." *Northwest Airlines*, 451 U.S. at 97.

The posited cause of action is so at odds with the statutory text and history of ERISA's comprehensive enforcement scheme that upholding it would not only depart from settled principles of statutory construction, but would also raise separation-of-powers concerns. *See id.* at 94, 95 ("the federal lawmaking power is vested in the legislative, not judicial, branch of government"); *see also Public Citizen* v. *United States*, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (discussing the "unhealthy process of amending the statute by judicial interpretation"). Whatever one's views on the proper objectives and methods of statutory interpretation in light of separation-of-powers concerns, surely no one would dispute that there is something terribly wrong with the notion that the legislative branch can decide to "*not provide civil liability for parties in interest*" in ERISA (JA 281-82), only

to have the judicial branch "interpret" ERISA as providing that civil liability.

### D. This Court's ERISA decisions support rejection of the posited cause of action.

This Court has declined to infer causes of action under ERISA. In *Massachusetts Mut.* v. *Russell*, 473 U.S. 134 (1985), the Court held that a plan-participant could not recover extracontractual damages under §§ 409 and 502(a)(2) for a fiduciary's delay in the payment of benefits, reasoning that it could not find "express authority" for the posited cause of action in the text of § 409. 473 U.S. at 144; *see also id.* ("[n]othing ... expressly provides for" such recovery). Having decided that "neither the statute nor the legislative history reveals a congressional intent to create a private right of action", the Court held that the inquiry goes no further. *See id.* at 148. The Court stated that it was "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA". *Id.* at 147.

*Mertens* reiterates *Russell*'s approach to construction of ERISA's enforcement provisions. *Mertens* held that § 502(a)(3) does not authorize compensatory damages, but instead permits only "equitable relief". *See* 508 U.S. at 251, 255-63. In dictum, the Court expressed pointed doubt about the threshold issue: whether a nonfiduciary's participation ("knowing or unknowing") in a fiduciary's breach violates ERISA, and thus whether ERISA "affirmatively authorizes" a cause of action against such a nonfiduciary — reemphasizing this Court's "unwillingness to infer causes of action in the ERISA context". 508 U.S. at 253-55 & n.5. One year later, this Court reiterated that the "omission of knowing participation liability in ERISA 'appears ... deliberate'" and observed that *Mertens* "rejected" the argument that a "knowing participation cause of action ... should be available under ERISA". *Central Bank*, 511 U.S. at 175, 184.



Further, *Mertens* expressly sets forth that: (i) ERISA is "a 'comprehensive and reticulated statute,' the product of a decade of congressional study" (*id.* at 251); (ii) provisions of Title I that assign duties to fiduciaries, and that make fiduciaries liable for breach of those duties, by their terms apply only to fiduciaries — there are no equivalent provisions directed to nonfiduciaries (*id.* at 251-53); and (iii) § 502(a)(3) — one of "ERISA's 'six carefully integrated civil enforcement provisions'" (*id.* at 252) — should not be read to apply to nonfiduciaries in the absence of "explicit[ ]" provisions in Title I imposing duties and liabilities on such nonfiduciaries. *Id.* at 253-55 & n.5.

The Seventh Circuit read in proper context dicta in *Mertens* on which Ameritech relies. *See* JA 350-51. *Mertens* states:

> Professional service providers ... must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees. (508 U.S. at 262.)

The "disgorge assets and profits" clause does not refer to civil liability. Rather, it refers to the "correction" of a prohibited transaction required to avert a 100% penalty (under § 502(i)) or excise tax (under § 4975(b)).[16] And the "related civil penalties" or "excise taxes" refers to the 5% penalty (under § 502(i)) or the excise tax (under § 4975(a)) to which the party-in-interest could still be subject even after correcting. In other words, the Secretary of Labor or IRS can seek to force certain parties-in-interest to correct prohibited

[16] A definition of "correction" appears in the agency regulations. *See* 26 C.F.R. § 53.4941(e)-1(c); 26 C.F.R. § 141.4975-13; 29 C.F.R. § 2560.502i-1(c).

transactions "at peril of a ... penalty". JA 351. That the ensuing clause discusses the assumption that "nonfiduciaries can be sued under § 502(a)(3)" — for injunctive relief, restitution, and other equitable decrees — underscores that the preceding "disgorge assets and profits" clause does *not* refer to civil liability under § 502(a)(3). And the parenthetical phrase — "assuming nonfiduciaries can be sued under § 502(a)(3)" — was stating an assumption concerning the potentiality of a cause of action against nonfiduciaries for participation in a fiduciary's breach — an assumption that a majority of the Court previously had made clear it was unwilling to make. *See* JA 351; 508 U.S. at 253-55 & n.5.

*Mertens*' further statement that "ERISA contains various provisions that can be read as imposing obligations upon nonfiduciaries" (508 U.S. at 253-54 & n.4) does not address the issue here: whether a nonfiduciary party-in-interest who enters into a prohibited transaction violates § 406(a) and may be held liable in a private suit. Even if ERISA "can be read" — in light of § 502(i) and IRC § 4975 — "as imposing obligations upon nonfiduciaries", that does not mean that § 406(a) imposes any such obligation or that ERISA "affirmatively authorizes" (*id.* at 253-55 & n.5) *civil actions* to impose *civil liabilities* upon nonfiduciaries — as distinct from the authorizations in §§ 502(a)(6) and (i) and § 4975 for penalties, suits to collect such penalties, or excise taxes.

Thereafter, this Court observed in *Spink* that: (i) these statements in *Mertens* "were in any event dicta"; and (ii) even "[i]nsofar as [these statements] apply to § 406(a)" — which "was not at issue" in *Mertens* — these statements "suggest liability for parties in interest *only* when a *violation* of § 406(a) has been established — which ... *requires* a showing that *a fiduciary caused* the plan to engage in the transaction in question". 517 U.S. at 889 n.3 (emphasis added).



In sum, *Mertens* makes clear that "where ERISA does not expressly impose a duty, there can be no cause of action". JA 348-49. The Seventh Circuit correctly applied that principle in declining to infer a cause of action here, since, "by its plain terms", § 406 does not regulate nonfiduciary conduct, and "imposes no explicit duty on parties in interest". JA 348; *see also* JA 353-54. The principles set forth in *Mertens*, and reiterated in *Central Bank*, also make it clear that § 502(a)(3) does not permit suit against persons who have not *themselves* violated an ERISA duty on a theory that such nonviolators participated in *someone else's* violation.

In *Spink* as well, this Court declined to read into ERISA duties not expressly provided. The Ninth Circuit held the defendant-employer-plan-sponsor liable as a party-in-interest that benefited from a § 406 prohibited transaction. This Court reversed, ruling that the Ninth Circuit "erred by not asking whether fiduciary status existed in this case" on the part of the defendant "before it found a violation of § 406(a)(1)(D)". 517 U.S. at 889. *Spink* concludes that a prerequisite to any § 406 claim is a showing "that a *fiduciary caused* the plan to engage in the allegedly unlawful transaction": "Unless a plaintiff can make that showing, *there can be no violation of § 406(a)(1) to warrant relief under the enforcement provisions*". *Id.* 888-89 (emphasis added). *Spink* underscores that "the only transactions rendered impermissible by § 406(a) are transactions caused by fiduciaries" and that § 406 "prohibits fiduciaries...", and "regulates the conduct of plan fiduciaries". *Id.* at 887-89 & n.3, 893.

*Spink* leaves open whether ERISA provides a cause of action against nonfiduciary parties-in-interest who benefit from a fiduciary's violation of § 406(a). *See id.* 889 n.3. Nevertheless, this Court's approach to whether Lockheed and its directors were liable is instructive. In Part III.A the Court unanimously concluded that these defendants were not acting as fiduciaries and so could not be liable under § 406(a), even though Lockheed had allegedly received a benefit. The

Court did *not* address in Part III.A whether some *other* person was a fiduciary who had caused the plan to enter into a prohibited transaction, although there were other persons who were alleged to be fiduciaries who violated § 406(a): Lockheed's Retirement Committee. Rather, the Court viewed the *non*fiduciary status of a defendant as ending the inquiry as to that defendant.[17]

After *Spink*, Ameritech conceded that "*fiduciary causation* is a *prerequisite* for nonfiduciary party-in-interest liability under § 406" and that "[t]he presence of a party-in-interest alone is not enough". Sal. C.A. App. 478-79 (emphasis added); *see also* PB 48. But Ameritech does not confront the significance of this facet of *Spink*. In light of *Spink*, any liability of a nonfiduciary party-in-interest — were it to exist — would be *dependent upon* the court first finding that a fiduciary violated § 406. It is wholly illogical to think that Congress, without expressly saying so, intended to establish a cause of action against a nonfiduciary party-in-interest that would turn on — not the culpability of such nonfiduciary — but rather on whether the fiduciary acted with the requisite culpability and thus violated § 406.

### E. Congress's decision not to provide the posited private cause of action does not compromise the ERISA enforcement scheme Congress enacted.

Policy-based arguments for why the excise-tax and penalty sanctions that Congress chose to provide are supposedly inadequate cannot overcome ERISA's text. The *Mertens* plaintiffs similarly argued that a construction of ERISA under which plans lack remedies, including those available at common law, contradicts ERISA's "basic purpose." *See*

[17] *Spink* involved a motion to dismiss a complaint alleging that the Retirement Committee members were fiduciaries and had violated, *inter alia*, § 406. *See* 517 U.S. at 886; JA 225-32. (In Part III.B, seven justices concluded that "[i]t is not necessary for us to decide ... whether the Retirement Committee members acted as fiduciaries," 517 U.S. at 892, because their conduct did not violate § 406.)



508 U.S. at 261. But this Court held that "vague notions of a statute's 'basic purpose' are nonetheless inadequate to overcome the words of its text regarding the *specific* issue under consideration.... This is especially true with legislation such as ERISA", which "resolved innumerable disputes between powerful competing interests — not all in favor of potential plaintiffs". *Id.* at 261-62 (internal citation omitted); *accord, e.g., Board of Governors* v. *Dimension Fin. Corp.*, 474 U.S. 361, 373-74 (1986) ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise, and, in the end, prevents effectuation of congressional intent.").

The policy arguments are fundamentally misguided. Congress chose to place the onus of avoiding prohibited transactions on fiduciaries, and also chose to provide that only those fiduciaries would bear civil liability for violations of § 406. The use of the excise tax and penalty scheme with an allocation of enforcement responsibility between Treasury and Labor was likewise a Congressional choice. Any issues concerning the adequacy of agency incentives or resources to carry out that scheme was inherent in that Congressional choice. This Court has held that it will not substitute its judgment for that of Congress. *See* p. 33, *supra*.

The policy arguments are also often unsupported or based on incorrect premises: (1) Ameritech presents no data to show that there in fact is an enforcement gap that a private right of action could remedy (*e.g.*, no data showing the number of instances in which a private party has asked Treasury or Labor to act, but Treasury or Labor has failed to act because of lack of resources). (2) The contention that collection of the excise tax "depends largely on voluntary self-assessment by the disqualified persons" (PB 36-37) is misleading — it is plan fiduciaries or sponsors (such as Ameritech Corp. here) who file annual reports with Labor and Treasury. *See* JA 165-70; ERISA § 104; IRC § 6058. (3) The fact that § 502(i) "applies only to a subset of ERISA plans"

(PB 35) is beside the point — § 4975 applies to the rest (including the Ameritech plans here, *see* PB 35). (4) The fact that a somewhat smaller class of persons are disqualified persons than are parties-in-interest (PB 37-38) only shows that Congress chose to limit which parties-in-interest it would subject to enforcement. For example, the definition of party-in-interest picks up *all* employees of certain parties-in-interest, whereas only "highly compensated employees" are deemed disqualified persons (PB 37).

Furthermore, Ameritech gives short shrift to the adequacy of the remedies that do exist, even apart from the potential in appropriate cases for the government to use excise taxes and penalties (each as much as 100% or more of the amount involved) to force the undoing of prohibited transactions. *First*, there are civil actions for damages and other relief against fiduciaries who cause a plan to enter into a prohibited transaction and any other fiduciaries who knowingly participate in that violation. *See* §§ 405, 406, 409. Here, *if* there was any violation of § 406, there has been no showing that the responsible fiduciaries, Ameritech Corp. and NISA, could not compensate APT for any losses — and Ameritech Corp., with its $20 billion in assets, clearly can. *See* Sal. C.A. App. 353, 789. Indeed, any losses suffered by APT are borne by Ameritech Corp., *not* its retirees or employees. JA 221-22. And even if the responsible fiduciaries cannot respond to a judgment, there is still the potential of recoveries from insurers of liable fiduciaries.[18]

*Second*, even though there is no cause of action under ERISA against nonfiduciary parties-in-interest, counterparties potentially are subject to suit under other federal or state laws, particularly if there is fraudulent conduct. A party-in-interest may potentially be subject to suit under other *federal* statutory schemes, ranging from the federal securities laws to RICO. Even assuming that *state* law claims

[18] Plans, fiduciaries and employers can purchase insurance to cover fiduciary liability for violations of ERISA. *See* § 410(b).



against a party-in-interest would be preempted (an issue that is *not* before the Court here), ERISA does not preempt other federal statutory remedies. *See* § 514(d). And if the counterparty is *not* a party-in-interest, it may potentially be subject to state-law claims as well. In any event, concern about the potential for preemption of state-law claims cannot overcome the text of the statute on the issue that is before the Court. *See Mertens*, 508 U.S. at 261.[19]

*Third*, allowing private civil actions *only* against fiduciaries may do more to further ERISA's aims than allowing suits against nonfiduciary parties-in-interest as well. Permitting a fiduciary to shift liability for a § 406 violation to a *non*fiduciary party-in-interest could dilute the force of the statutory proscription that a "fiduciary ... shall not cause" a plan to engage in a prohibited transaction. In many cases, the fiduciary that caused the alleged § 406(a) violation, or a cofiduciary who violated § 405, also controls who is sued. As this case demonstrates, fiduciaries with that control will rarely sue themselves. Here, there is substantial evidence that executives of fiduciary Ameritech Corp. caused APT to buy the participation interests or, at least, actively participated in making the investments.[20] And fiduciary NISA agreed that it would not knowingly engage in any prohibited transaction. JA 151. Yet Ameritech Corp. is a plaintiff, not a defendant, and NISA is not a party. APT's fiduciaries are

[19] Here, Salomon denies that it is a party-in-interest. Salomon also denies that the transactions were nonexempt prohibited transactions, disputes that there was any unjust enrichment, asserts various equitable and statutory defenses, and disputes the applicability of either § 4975 or § 502(i). Ameritech did not assert federal securities-law claims and its RICO claims were dismissed. *See* Sal. C.A. App. 72-76. Salomon asserted that Ameritech's state-law claims were defective on numerous state-law grounds. *See* R.123, R.210. Whether a remedy in fact exists against a particular party does not detract from the fact that Congress provided expressly for some remedies but omitted others.

[20] *See, e.g.*, JA 68-71, 74-80, 120-21, 128-30, 147-48, 154-55, 161-63, 188-89, 200-03; Sal. C.A. App. 373-93, 459-69, 595-99, 609-10, 612-13, 639, 668-74, 677-78, 681-83, 687-92, 694-95, 724-28, 741-42, 758-68.

attempting to shift to Salomon — a nonfiduciary — responsibility for an alleged violation of § 406 that Congress placed squarely on them.

*Finally*, it is by no means certain that creating the posited cause of action against nonfiduciaries that transact with ERISA plans will ultimately benefit the plans. *Mertens* noted the countervailing policy concern that expanding nonfiduciary liability could "impose high insurance costs upon persons who regularly deal with and offer advice to ERISA plans, and hence upon ERISA plans themselves." 508 U.S. at 262. And the specter of civil liability on Ameritech's theory may also prompt some nonfiduciaries to curtail transactions with plans, leaving plans with a less competitive market in which to invest. *Mertens* correctly recognized that this Court should not "adjust the balance" that Congress struck between competing goals. *Id.* at 263.

**F. The posited cause of action would open the door to a wide range of potential suits that Congress did not contemplate or provide for in ERISA.**

Not only would private suits against nonfiduciary parties-in-interest open the door to the disquieting prospect of fiduciaries attempting to hold nonfiduciaries responsible for a fiduciary's breach, but the pernicious impact of such suits would be compounded if (as Ameritech has asserted) nonfiduciaries could be liable on a basis akin to strict liability or without regard to whether the defendant was a violator or wrongdoer. The pernicious impact would be further compounded if one seeks, as Ameritech does, to stretch the definition of parties-in-interest to include outside parties transacting at arm's length with professional asset managers for multi-billion dollar plans.

Yet additional unsettling consequences emerge when one considers that many of the exemptions to § 406 are highly technical and often depend on information or circumstances beyond the knowledge and control of nonfiduciary parties-



in-interest. For instance, Prohibited Transaction Exemption 84-14 exempts certain transactions involving a defined class of "qualified professional asset managers", or "QPAMs". *See* 49 Fed. Reg. 9494 (1984).[21] Suppose Manager, a QPAM, invests (as part of a diversification strategy) a small amount of Executive Plan's assets in interests in an oil-drilling venture sold by Driller. Driller is a diversified company whose data-processing subsidiary provides ongoing computer services to Executive Plan, allegedly making Driller a party-in-interest. *See* §§ 3(14)(B) & (H). After the price of oil unexpectedly plummets, Manager realizes that at the time the investment was made the assets it managed for Executive Plan — when combined with the assets it managed for Employees Plan, an affiliate of Executive Plan — exceeded 20% of Manager's total client assets. The exemption thus does not apply and the transaction may be prohibited. *See* PTE 84-14, §§ I(e) and V(c)(1), 49 Fed. Reg. at 9504-06. On Ameritech's theory, a plan fiduciary — including even Manager, the fiduciary that violated § 406, who should monitor its own compliance with exemptions — could sue Driller for "equitable" relief.

Consider next PTE 75-1, which exempts certain securities transactions with certain parties-in-interest. The exemption imposes specific record-keeping requirements on the fiduciary. *See* 40 Fed. Reg. 50,845 (1975). Suppose Fiduciary X invests plan assets in securities issued in a private placement by Web.com. The securities are purchased in the secondary market from Broker, whose subsidiary provides ongoing custodial services to the plan, allegedly rendering Broker a party-in-interest. The pertinent conditions of PTE 75-1 obtain at the time of the transaction. But subsequently, the Internet investment "bubble" bursts. Fiduciary Y is brought

[21] The Prohibited Transaction Exemptions discussed here as examples are safe harbors. For example, PTE 84-14 states that "the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction." 49 Fed. Reg. at 9504; *accord* 40 Fed. Reg. 50,845 (PTE 75-1).

in to replace Fiduciary X, and discovers that Fiduciary X carelessly misplaced the required records and that the transaction may thus be deemed prohibited. *See* PTE 75-1, § II(e), 40 Fed. Reg. at 50,847. PTE 75-1 would continue to exempt Broker from excise taxes or penalties, but would not expressly exempt Broker from the "restrictions of § 406(a)". *Id.* On Ameritech's theory that § 406(a) could be the predicate for civil liability, Broker would have no exemption from civil liability and Fiduciary Y could sue Broker for "equitable" relief.[22]

It would be of little consolation to inform Driller and Broker that a court will not compel them to make restitution to the plan unless they were unjustly enriched. Driller and Broker could still be dragged into court and subjected to litigation over technical exemptions and arguments — with the benefit of 20/20 hindsight — over "unjust enrichment".

Moreover, as noted, Ameritech's nonviolator-liability theory cannot logically be confined to liability of parties-in-interest for prohibited transactions. Rather, on this theory, *any person* can be sued under § 502(a)(3) for *some other person's* violation of Title I or the terms of a plan. Thus, suppose Fiduciary Z violates its duty under § 404(a) to diversify investments by using all of a plan's assets to purchase a highly leveraged equity-interest in an office building from Seller, who had never before dealt with the plan. Then the real estate market collapses. On Ameritech's theory, Fiduciary Z could now sue Seller for restitution to "redress" the fiduciary's own violation of § 404(a) — even absent any violation or wrongdoing by Seller. Or assume a plan provides that only Fiduciary A is authorized to make real-estate investments, but Fiduciary B purchases an apartment building for the plan from Seller. The investment is prudent in all respects. But then the market declines and the plan violation is detected. On Ameritech's theory, either Fiduciary A or B could sue Seller to "redress" Fiduciary B's violation of the terms of the plan, and yet more litigation over "unjust enrichment"-in-hindsight ensues — litigation that Congress neither authorized nor intended.[23]

[22] In a case where an exemption is lost because of a fiduciary's misfeasance, there is no rational reason for PTE 75-1 to exempt a nonfiduciary party-in-interest from excise taxes and penalties yet subject it to civil suit. Thus, the omission from § II(e)(1) of any reference to continued exemption of nonfiduciary parties-in-interest from the "restrictions of § 406(a)" shows that the Departments of Labor and Treasury originally presumed that such parties were *not* subject to civil liability. The fact that PTE 75-1 provides exemptions applicable to nonfiduciary parties-in-interest in no way suggests that such parties potentially are subject to civil liability. The explicit purpose of PTE 75-1's application to nonfiduciary parties-in-interest is to exempt them from excise taxes and penalties.



### G. The Secretary of Labor's "interpretation" is not entitled to deference.

Ameritech — but *not* amicus United States — argues that the Secretary of Labor's "interpretation" of the statutory language is entitled to deference. However, Congress did not delegate questions regarding the existence and scope of causes of action under ERISA to the Secretary of Labor. Rather, whether § 502(a)(3) authorizes a civil action is for the courts to decide. *See* §§ 502(e) & (f). As stated in *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 649-50 (1990), "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute." None of the cases Ameritech cites

[23] The hypothetical of a party-in-interest who bribes a plan fiduciary to invest in its real-estate development (*see* USB 23-24) does not support implying the posited cause of action. *First*, the harm to the plan arising from the fiduciary's acceptance of a bribe is the same whether the briber is a party-in-interest or not. And in either case the fiduciary would violate, *e.g.*, § 406(b)(3), and the plan would have full recourse against the fiduciary. *Second*, the party-in-interest would potentially be subject to disgorging the investment, or be subject to an excise tax or penalty of 100% or more under IRC § 4975 or § 502(i). *Third*, both the fiduciary *and* the briber could be criminally liable and, additionally, their conduct may constitute a RICO predicate act. *See* 18 U.S.C. §§ 1954, 1961(1).

involved judicial deference to an agency's "interpretation" of a statutory cause of action.

Moreover, even if the matter is within the purview of the agency, where — as here — "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron* v. *Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). Finally, Ameritech does not contend that the Department of Labor has expressed its position in any regulation or other interpretative pronouncement. Rather, Ameritech points only to positions taken in litigation. This Court has properly questioned whether agency positions expressed in litigation, as opposed to administrative regulation, are entitled to judicial deference. *See, e.g., Bowen* v. *Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) ("Deference to what appears to be nothing more than an agency's convenient litigating position would be entirely inappropriate."). Deference would be particularly inappropriate here since Labor's current litigation position contradicts the implicit assumption of the Departments of Labor and Treasury in class exemption PTE 75-1 that nonfiduciary parties-in-interest are *not* subject to civil liability. *See* p. 44 n.22, *supra*.

### H. The court-of-appeals decisions that infer the posited cause of action are wrongly decided.

The court-of-appeals decisions that infer the posited cause of action explicitly or implicitly engage in a dramatic burden shifting in which the cause-of-action inquiry becomes whether the statute does not bar such a suit instead of "whether the statute affirmatively *authorizes* such a suit". *Compare Mertens*, 508 U.S. at 255 n.5 *with, e.g., Herman* v. *SCNB*, 140 F.3d 1413, 1419-22 (11th Cir. 1998) (asserting that § 406(a) "does not address, much less limit, who shall be personally liable", and "§ 502(a)(5) does not restrict the type



of parties who can be so sued") (internal quotation marks omitted) (emphasis added).

Further, the circuit decisions almost entirely *ignore* the legislative history that demonstrates Congress decided not to impose civil liability upon parties-in-interest. The decisions of five of the six circuits do not even mention that Congress rejected an express civil-liability provision for parties-in-interest. Only the Tenth Circuit, in *Reich* v. *Stangl*, 73 F.3d 1027 (10th Cir. 1996), even refers to this fact. Yet not even the Tenth Circuit addressed the fact that this rejection followed the Conference staff's recommendation to "not provide civil liability for parties in interest". Finally, several of the circuit decisions pre-dated this Court's decision in *Lockheed* v. *Spink*, which characterizes the *Mertens* passages on which several of them rely as "dicta" "not at issue" in *Mertens*, and which holds that "the only transactions rendered impermissible by § 406(a) are transactions caused by fiduciaries". *See* 517 U.S. at 889 n.3. And the post-*Spink* decisions do not consider the implications of *Spink*'s ruling discussed in Point I.D, above.

## II. AMERITECH'S FAILURE TO PROFFER ADMISSIBLE EVIDENCE THAT SALOMON KNEW A FIDUCIARY WAS VIOLATING § 406 PROVIDES AN INDEPENDENT GROUND TO AFFIRM.

In the Seventh Circuit, Salomon argued in the alternative that — even if the posited cause of action exists — a plaintiff must prove that the nonfiduciary party-in-interest knew at the time that the fiduciary that caused the plan to engage in the transaction was violating § 406(a). Yet Ameritech had presented *no* admissible evidence that Salomon had the requisite knowledge. The Seventh Circuit never reached this alternative ground. Nevertheless, Salomon is entitled to rely on it for affirmance. *See, e.g., United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994).

### A. Knowledge that a fiduciary was violating § 406(a) must be an element.

Ameritech would turn statutory silence into a virtue: The statutory text provides no standard of culpability applicable to the counterparty to the transaction, *ergo*, on such reasoning, liability may attach without regard to culpability or wrongdoing. Indeed, the district court concluded that "under § [406(a)] defendants are held to a standard that approximates strict liability ...". JA 337; *see also* JA 311.

For the fiduciaries § 406(a) does expressly regulate, § 406(a) includes an express culpability standard ("knows or should know"). And the *rejected* Senate bill that would have imposed civil liability on nonfiduciary parties-in-interest did include an express culpability standard. *See* Point I.B.2, *supra*. On Ameritech's theory, nonfiduciaries sued for § 406(a) violations could be in a *worse* position than had the Senate proposal been adopted. Plainly, the silence of ERISA as enacted concerning any culpability standard applicable to a *non*fiduciary only further underscores that ERISA does not provide the cause of action Ameritech posits.

In any event, *Spink* makes clear that a nonfiduciary party-in-interest cannot be liable unless the court first finds that a fiduciary violated § 406. *See* Point I.D, *supra*. It follows from the dependent nature of any hypothetical claim against a nonfiduciary party-in-interest that knowledge by it that the fiduciary was violating § 406 must be an element. Knowledge of the fiduciary's breach was required for the *knowing* participation claim that *Mertens* in dictum rejected. *See, e.g., McDougall* v. *Donovan*, 539 F. Supp. 596, 598 (N.D. Ill. 1982).[24] If knowledge of the fiduciary's violation was

[24] In ruling that a nonfiduciary party-in-interest could be held liable, *McDougall* erroneously relied on language from a Senate committee report on a proposed bill (S. 4). *See* 539 F. Supp. at 598 (citing S. Rep. No. 93-127, at 35 (1973), 1 Leg. Hist. 621). That Senate bill was *not* enacted, and the underlying provision on which the report commented differs significantly from ERISA as enacted. This Court itself has rejected reliance on that same language from the Senate committee report. *See Russell*, 473 U.S. at 145-46.



required for a pre-*Mertens*, dependent, knowing-participation claim, it surely must be required for any (hypothetical) dependent claim against a nonfiduciary party-in-interest that might exist after *Mertens* and *Spink*. One cannot fairly construe *Mertens* — with its emphasis on restricting remedies and rights of action — as *expanding* the circumstances under which a nonfiduciary party-in-interest can be liable by (implicitly) overruling pre-*Mertens* case law that required proof of *knowing* participation.

Furthermore, even a co-fiduciary who participates in a prohibited transaction caused by another fiduciary can be liable only if such co-fiduciary "*know[s] such act or omission [by the other fiduciary] is a breach*" (§ 405(a)(1)) (emphasis added) — *i.e.*, knows that the fiduciary who caused the plan to enter into the transaction is violating § 406. *See also* Conf. Rep. at 299, 3 Leg. Hist. 4566 (to be liable, the co-fiduciary, among other things, "must know that he participated in the act that constituted a breach, and must know that it was a breach"). Civil liability should not be imposed upon a *non*fiduciary party-in-interest upon less proof than required to hold a participating fiduciary liable.

Ameritech suggests that this Court need not define the elements of the posited claim against nonfiduciary parties-in-interest now, but should leave that to the future. *See* Pet. Reply 6 n.6. But the very fact that the elements of the posited claim — including even the standard of culpability — require judicial determination underscores the perils of implying a cause of action into a statute that not only provides detailed express duties, liabilities, and remedies, but also provides explicit standards of culpability.

### B. Ameritech did not offer evidence that Salomon knew a fiduciary was violating § 406(a).

Ameritech offered *no* admissible evidence that Salomon knew at the time of the transactions (1987-1989) that a fiduciary of APT was violating § 406(a). At the time, *no one* thought that the transactions violated § 406. *See, e.g.*, p. 1, *supra*. Indeed, Ameritech represented in its 1987, 1988 and 1989 reports to the Government that there were *no* non-exempt prohibited transactions. *See* p. 1, *supra*. That Ameritech and NISA did not at the time believe the transactions violated § 406 underscores the total absence of evidence that *Salomon* somehow knew this (to say nothing of the absence of evidence that Salomon knew that Ameritech Corp. or NISA knew that *they* were violating § 406).

Ameritech has previously argued that, if any knowledge requirement exists, it is sufficient for Ameritech to offer evidence that Salomon (supposedly) knew that it was a service provider, that it transacted with a plan and that NISA was a fiduciary that caused the plan to enter into the transactions. *See* Pet. Reply 6. But even putting aside that Ameritech's own Chief Investment Officer and NISA's CEO have testified that *they* did not regard or identify Salomon as a party-in-interest (*see* p. 1, *supra*), the matters to which Ameritech points — even assuming *arguendo* they were all true — do not establish that Salomon knew that NISA was violating § 406. Among other things, § 406(a) provides for exceptions: "Except as provided in [§ 408]". If a transaction falls within an exemption — which may turn on matters that are within the fiduciary's knowledge or control (*see* Point I.F, *supra*) — one does not have to go further; there simply can be no violation by the fiduciary.

## CONCLUSION

The Court should affirm the judgment of the court of appeals.

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IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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## REPLY BRIEF FOR THE PETITIONERS

The parties agree that analysis in this case of statutory construction "begins with the language of" ERISA. Resp. Br. 11 (quoting *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999)). The parties also agree that the Court should be "reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA." Resp Br. 34 (quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 147 (1985)). These interpretive principles favor Petitioners, not Respondents. Petitioners' interpretation accounts for *all* the relevant statutory language. Respondents' interpretation, in contrast, requires the Court to "tamper with" ERISA's carefully-crafted enforcement scheme. Interpreting ERISA § 502(a)(3) to allow suits for equitable restitution – the return of plan assets and profits – from non-fiduciary parties in interest who engage in prohibited transactions with a plan "is consistent with" – indeed, required by – "the literal language of the statute, the Act's purposes, and pre-existing trust law." *Varity Corp. v. Howe*, 516 U.S. 489, 515 (1996).

### I. The Statutory Text Authorizes Civil Actions Seeking Restitution From Parties In Interest That Engage In Prohibited Transactions With A Plan.

1. **Section 502(a)(3).** Respondents and their *amici* assert that § 502(a)(3) only authorizes "plaintiffs to seek 'appropriate equitable relief' against *violators* of provisions that appear elsewhere in Title I." Resp. Br. 15; *see* ACLI Br. 8; BMA Br. 25. That assertion is essential to Respondents' argument. Unfortunately for Respondents, it is not faithful to the carefully-crafted language of § 502(a)(3). If Congress had wanted to restrict § 502(a)(3) to "violators," it would have used different language to achieve that result – for example, by authorizing a cause of action against "any fiduciary" or "any person" who violates a provision of Title I.[1] The statutory language that Congress used in

[1] Congress used just such language in a subsequent statute modeled directly on ERISA. *See* Federal Employees' Retirement System Act of 1986, Pub. L. No. 99-335, 100 Stat. 514 (codified as amended at 5 U.S.C. § 8477). That statute provides: "[A] civil action may be brought ... by the (...footnote continued)

§ 502(a)(3) is quite different. Without restricting the parties subject to suit, Congress authorized civil actions for "appropriate equitable relief" to "redress" "any act or practice which violates any provision of" Title I of ERISA. As explained in Petitioners' opening brief (Pet. Br. 15-18), the reference to "any act or practice which violates" Title I, rather than "any person who violates Title I," dovetails with the reference to "appropriate equitable relief" to "redress" such violations. *See also* U.S. Br. 14 ("Redress" means "the setting right of what is wrong."). "[A]ppropriate equitable relief" includes equitable restitution pursuant to a constructive trust, which is *not* limited to "violators," but extends to any party who has been unjustly enriched as a result of a *violation*, where restitution would "redress" the violation. *See* Pet. Br. 28-31; *Beatty v. Guggenheim Exploration Co.*, 122 N.E. 378, 380-81 (N.Y. 1919) (Cardozo, J.) ("A constructive trust is the formula through which the conscience of equity finds expression. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee."). In short, Congress's carefully-crafted statutory language focuses on *violations*, not *violators*.[2]

Petitioners are not asking this Court to "infer" a cause of action that Congress did not "incorporate expressly" into ERISA's civil enforcement provisions. *Russell*, 473 U.S. at 146-47. To the contrary, Petitioners ask the Court to interpret those provisions according to their plain terms. It is *Respondents* who must ask the Court to "tamper with" carefully-crafted statutory language.

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(. . . continued)
Secretary of Labor [or] ... any participant, beneficiary, or fiduciary *against any fiduciary* ... to enjoin any act or practice which violates any provision of subsection (b) or (c) [or] to obtain any other appropriate equitable relief to redress a violation of any such provision." 5 U.S.C. § 8477(e)(3)(A), (B) (emphasis added).

[2] Other subsections of § 502 confirm that Congress's choice not to limit the parties subject to suit under § 502(a)(3) was deliberate. For example, § 502(a)(2) refers to § 409 and thereby authorizes suits *only* against fiduciaries.



2. **Section 406(a) and Related Provisions.** Section 406(a) prohibits certain "[t]ransactions between [a] plan and [a] party in interest." 29 U.S.C. § 1106(a). Respondents focus on the introductory clause, which states that a "fiduciary ... shall not cause" a plan to engage in such a transaction. Because § 406(a) does not contain a similar express direction that parties in interest shall not engage in such transactions, Respondents contend, § 406(a) does not prohibit non-fiduciary parties in interest from engaging in any transactions with a plan. That is precisely the "'blue pencil' method of statutory interpretation" this Court has rejected. *Russell*, 473 U.S. at 142; *see also FDA v. Brown & Williamson Tobacco Corp.*, No. 98-1152, slip op. 9 (Mar. 21, 2000) ("[A] reviewing court should not confine itself to examining a particular statutory provision in isolation. ... A court must ... 'fit, if possible, all parts into an harmonious whole.'") (citations omitted). When *all* the relevant parts of ERISA are considered, it is clear that § 406(a) prohibits *transactions* (not just fiduciary conduct) and that a party in interest violates § 406(a) by engaging in a prohibited transaction.[3]

a. **Section 3003(c).** ERISA § 3003(c) directs the Secretary of Labor to transmit to the Secretary of the Treasury any "information indicating that *a party-in-interest* or disqualified person *is violating section 406* of this Act." (Emphasis added). The text of

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[3] Section 406(a) provides that a fiduciary shall not cause a plan to engage in a transaction if "he knows or should know" that the transaction is prohibited. Respondents assert (Resp. Br. 7) that the absence of similar language with respect to parties in interest makes sense only if § 406(a) is directed solely to fiduciaries. Not so. A party in interest who engages in a transaction prohibited by § 406(a) is subject to punitive excise taxes (26 U.S.C. § 4975) or civil penalties (§ 502(i)) *without regard to what the party in interest knows or should know*. In contrast, a party in interest generally is subject to equitable restitution pursuant to § 502(a)(3) only if it is not a "bona fide purchaser for value," *i.e.*, a purchaser who neither knew nor should have known that the transaction was prohibited. *See infra* pages 8-9 n.9, 10-11. The "knows or should know" language in § 406 serves the important purpose of subjecting a fiduciary (but not a non-fiduciary party in interest) to personal liability for direct and consequential *damages* arising from the transaction. *See* ERISA § 409.

§ 3003(c) thus gives a clear answer to the question whether a "party in interest" can "violat[e]" § 406(a): It can. Respondents' effort to explain away § 3003(c) borders on the absurd. Respondents assert (Resp. Br. 24-25) that, although Congress *said* "party-in-interest," it *meant* "fiduciary." But "party in interest" and "disqualified person" are defined terms, *see* ERISA § 3(14); 26 U.S.C. § 4975(e)(2); and both terms are considerably broader than "fiduciary," which is also statutorily defined, *see* ERISA § 3(21), 26 U.S.C. § 4975(e)(3). Moreover, § 3003(c) plainly is intended to cover all persons who may be subject to an excise tax. The tax applies to "*any* disqualified person *other than* a fiduciary acting only as such" (*i.e.*, a fiduciary who merely causes a plan to engage in a prohibited transaction with a party in interest). *See* 26 U.S.C. § 4975(a), (b) (emphasis added).

b. **Section 502(*l*).** Section 502(*l*) provides that a fiduciary "or other person" may be ordered to pay money "to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection ... (a)(5)" (and, therefore, in a judicial proceeding under subsection (a)(3)). The text of § 502(*l*)(4) confirms that "other person" refers to a non-fiduciary party in interest who engages in a prohibited transaction by expressly referencing the "penalty or tax imposed on such ... other person ... under subsection (i) of this section and section 4975." Respondents' cursory discussion of § 502(*l*) (Resp. Br. 23) mirrors their handling of § 3003(c): although Congress *said* "fiduciary or other person," it *meant* "fiduciary or co-fiduciary." But a co-fiduciary *is* a "fiduciary." Moreover, "person" is a defined term in ERISA, and means something very different from "fiduciary." *Compare* ERISA § 3(9) *with* ERISA § 3(21).[4]

c. **Section 4975(h).** Rather than recognizing 26 U.S.C. § 4975(h) for what it is – a provision that explicitly recognizes the

[4] Respondents incorrectly suggest (Resp. Br. 23) that § 502(*l*) has no bearing on the interpretation of § 406(a) because § 502(*l*) was added to ERISA in 1989. Section 502(*l*) is an integral part of ERISA; the Court's obligation to fit the statutory parts into "an harmonious whole" applies as much to § 502(*l*) as to any other provision of the statute.



Secretary of Labor's authority to "obtain a correction of the prohibited transaction" – Respondents contend (Resp. Br. 24) that the Secretary of Labor's authority extends only to cases in which the party in interest happens to be a fiduciary. In all other cases, according to Respondents, the Secretary of Labor is limited to "threat[ening] that the *IRS* will assess a tax or "comment[ing]" on the situation. *Id.* It is unlikely that Congress would assign one agency the tasks of merely commenting on another agency's work or threatening action that only the other agency is authorized to take. Any such threat could be made more credibly, and with less bureaucratic paper-shuffling, by the IRS itself.[5]

d. **Section 502(i).** By imposing substantial penalties on parties in interest who engage in prohibited transactions, § 502(i), together with § 4975, demonstrates that parties in interest are in fact prohibited from engaging in such transactions. As the district court recognized, if § 406(a) does not apply to parties in interest, then Congress had no basis for penalizing parties in interest who engage in transactions prohibited by § 406(a). J.A. 304.

Contrary to the court of appeals' reasoning (J.A. 350), the presence of civil penalties under § 502(i) and punitive taxes under § 4975(h) does not make the absence of a "specific" provision imposing civil liability on parties in interest "striking." In *Varity*, the Court found no reason to "believe that Congress intended ... specific remedies" in § 409 "as a *limitation*" on general remedies under § 502(a)(3). *Varity*, 516 U.S. at 511. The same is true here. Section 502(a)(3)'s language creating a civil cause of action for

[5] The statutory text refutes the assertion (ACLI Br. 27) that the IRS has "sole enforcement authority" with respect to non-fiduciary parties in interest that engage in prohibited transactions with tax-qualified plans. Section 4975(h) expressly gives the Secretary of Labor a role in enforcing the prohibited transaction provisions against parties in interest. Section 3003(b)'s requirement that Labor and the IRS "consult" and "coordinate" hardly suggests a sharp division of authority between the agencies. And contrary to ACLI's representation (ACLI Br. 28), the "notification dut[ies]" of Labor and the IRS *are* "reciprocal": Section 3003 requires Labor to notify the IRS, while § 4975(h) (which is expressly referenced in § 3003) requires the IRS to notify Labor.

"appropriate equitable relief" to "redress" "any act or practice which violates" Title I is clear, broad, and unqualified. The Court should decline Respondents' invitation to re-write the statute.[6]

e. **Section 206(e).** Respondents point to § 206(e) as "[a]nother" provision that is "directed against only one party to a transaction." Resp. Br. 7-8. According to Respondents, the language of § 206(e) (a "fiduciary ... shall not permit" a plan to make a "prohibited payment" to a participant or beneficiary) implies that § 206(e) applies solely to fiduciaries. Respondents' reliance on § 206(e) begs the question whether a participant or beneficiary who receives a payment of plan assets to which he or she is not entitled, in violation of ERISA, may be required to return the assets pursuant to § 502(a)(3). The unambiguous text of § 502(a)(3) compels an affirmative answer to that question.[7]

In sum, Respondents' interpretation of § 406(a) fails to "fit ... all parts [of the statute] into an harmonious whole." *Brown & Williamson*, No. 98-1152, slip op. 9. When all the relevant statutory provisions are considered, it is clear that the prohibited transaction provisions of § 406(a) apply to non-fiduciary parties in interest as well as to fiduciaries.[8]

[6] ACLI incorrectly asserts (ACLI Br. 16 n.7) that ERISA's statute of limitations, § 413, applies only to claims against fiduciaries, and thus leaves non-fiduciary parties in interest facing "open-ended potential liability." Section 413 establishes a limitations period for suits "with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, *or with respect to a violation of this part* ...." (Emphasis added).

[7] If actions for equitable restitution under § 502(a)(3) were limited to "violators" there would be no way to recover plan assets paid out in violation of § 206(e) – a result Congress is unlikely to have intended. Respondents' other examples of transactions prohibited "on one side only" are inapposite. It is hardly surprising, for instance, that Congress would choose to impose civil liability on an investment advisor for defrauding his client, rather than on the client for *being defrauded*, *see* 15 U.S.C. § 80b-6; or on a U.S. citizen for selling arms to a terrorist-sponsoring nation rather than on a foreign sovereign for purchasing the arms, *see* 22 U.S.C. § 2780(b).



## II. A Non-Fiduciary Party In Interest Has A Duty Under ERISA To Return Assets Obtained In A Prohibited Transaction With A Plan.

1. Respondents assert (Resp. Br. 13, 16-19) that ERISA does not impose any duties or liabilities on non-fiduciary parties in interest and, therefore, that there is no basis for subjecting them to actions for equitable restitution under § 502(a)(3). For the reasons explained in Part I above, § 406(a) imposes on non-fiduciary parties in interest a duty to refrain from engaging in prohibited transactions. *See also* Pet. Br. 15-27. Moreover, it is undisputed that non-fiduciary parties in interest are subject to significant liabilities, in the form of punitive excise taxes (26 U.S.C. § 4975) or civil penalties (§ 502(i)), that are designed to (1) deter parties in interest from engaging in prohibited transactions, (2) encourage parties in interest who engage in such transactions to correct them, and (3) deprive parties in interest who refuse to correct a prohibited transaction of all plan assets acquired in the transaction. Congress was not silent or ambivalent about the duties or liabilities of non-fiduciary parties in interest: ERISA treats parties in interest who engage in prohibited transactions as wrongdoers subject to punitive sanctions.

2. Moreover, non-fiduciary parties in interest have a duty to undo prohibited transactions under § 502(a)(3). Respondents resist this conclusion, but it follows directly from the language of

[8] Because the statutory language is unambiguous, that "is the end of the matter." *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842 (1984). If that were not so, however, it would be appropriate to defer to the Secretary of Labor's interpretation of § 502(a)(3) and (a)(5). Respondents' reliance on *Adams Fruit Co v. Barrett*, 494 U.S. 638 (1990), is misplaced. There, Congress had established an "enforcement scheme" wholly "independent of the Executive." *Id.* at 650. Where, as here, Congress has created a dual enforcement scheme, deference is appropriate. *Cf. NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992). Deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), is appropriate in any event.

§ 502(a)(3). Even if Respondents were correct that the only person who can violate § 406(a) is the fiduciary who causes a plan to enter into a prohibited transaction, the transaction itself (or, at least, the fiduciary's act of causing the plan to enter into the transaction) is undeniably an "act or practice which violates" § 406(a). Restitution pursuant to a constructive trust is clearly "appropriate equitable relief" to "redress" such a violation under § 502(a)(3), even if the party in interest did not itself violate § 406(a).

a. Respondents invoke this Court's statement that, "because ERISA is a comprehensive and reticulated statute ... it should not be supplemented by extra-textual remedies." Resp. Br. 16 (quoting *Hughes Aircraft*, 525 U.S. at 447). That statement does not apply to this case, because the remedy Petitioners are seeking is *not* "extra-textual." The text of § 502(a)(3) expressly provides for "appropriate equitable relief," thereby explicitly referring to and incorporating common law principles governing equitable remedies. The relevant interpretive principle is thus not that the Court should avoid "extra-textual remedies," but that where Congress expressly employs "the language and terminology of trust law," it is appropriate to look to judicially-developed "principles of trust law" to interpret the statutory language. *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 110-11 (1989); *Varity Corp.*, 516 U.S. at 496.

b. Respondents deny (Resp. Br. 16) that ERISA's explicit authorization of "appropriate equitable relief" to "redress" "any act or practice which violates" Title I refers to "any supposed doctrine imposing liability upon nonviolators." Respondents cite no authority for this assertion – and with good reason. It is settled beyond dispute that the equitable remedy of restitution pursuant to a constructive trust does *not* turn on whether the defendant is a "violator" or wrongdoer, but instead depends on whether the defendant would be unjustly enriched if allowed to retain trust assets. *See* Pet. Br. 28-31 (citing authorities).[9] Under equitable

[9] Respondents' suggestion (Resp. Br. 18) that a transferee of trust property must have "actual knowledge" of a breach in order to be subject to restitution pursuant to a constructive trust is incorrect and misleading. The section of Scott's treatise that Respondents cite (which discusses

(...footnote continued)



principles expressly incorporated into ERISA by § 502(a)(3), restitution pursuant to a constructive trust is thus "appropriate" to "redress" a violation of ERISA, without regard to whether the party in possession of the assets is itself a "violator."[10]

c. Respondents next accuse Petitioners of advocating a "hybrid" cause of action" that looks to Title I of ERISA to determine whether there has been a violation and to the common law to determine the nature and scope of "appropriate equitable relief." Resp. Br. 18. This so-called "hybrid" is not the result of tricky lawyering; it is what the statutory language commands. Under § 502(a)(3), in the event of "any act or practice which violates any provision of" Title I, designated plaintiffs are authorized to bring a civil action for "appropriate equitable relief" to "redress" the violation. The statutory language thus directs courts to look to the statute to determine whether there is a substantive violation, and to

(. . . continued)

participation-in-fiduciary-breach claims, not claims against a transferee of trust property) observes that actual knowledge is a *sufficient* (but not a *necessary*) basis for imposing a constructive trust; the authors repeatedly recognize that constructive knowledge is also sufficient. *See* IV Austin W. Scott & William F. Fratcher, *The Law of Trusts* § 326.1, at 293-95 (4th ed. 1989) ("reason to know," "should have known," "reason to believe"). Contrary to Respondents' assertion (Resp. Br. 18), *all* of "Ameritech's authorities" – and many more – confirm that constructive knowledge is a sufficient basis for holding a transferee liable for the return of trust property. *See, e.g., Restatement of Restitution* § 174 (1937) ("should know"); *Restatement (Second) of Trusts* § 297(a) & cmt. a (1959) ("should know"); IV Scott & Fratcher, *supra*, § 297, at 110 ("should know"); George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees* § 891, at 265 (2d ed. 1995) ("should have possessed").

[10] The legislative history specifically confirms that "appropriate equitable relief" includes a "constructive trust ... imposed on the plan assets." S. Rep. No. 93-383, at 105 (1973), 1 Leg. Hist. 1173. Respondents would have the Court ignore this clear statement for the sole reason that the Senate bill to which it refers was not ultimately enacted *in toto*. As shown below, however, *see infra* page 16, § 502(a)(3)'s reference to "appropriate equitable relief" was modeled on the language of the Senate bill.

common law principles to determine the nature and scope of "appropriate equitable relief" to "redress" the violation.

It is hardly surprising that Congress, given its goal of providing additional protection for plan assets, *see, e.g., Boggs v. Boggs*, 520 U.S. 833, 845 (1997), would modify the substantive rules governing transactions with a plan (which Congress found to be inadequate), while incorporating judicially-developed principles governing appropriate equitable relief for substantive violations (which Congress did not find to be insufficient). Congress thus *displaced* the common law rules governing the conduct of fiduciaries and others who deal with plans (§ 406(a)), but *embraced* common law rules governing the nature and scope of "appropriate equitable relief" (§ 502(a)(3)). Whether dubbed a "hybrid" or not, that is the outcome required by the statutory text and this Court's precedents considering the interaction of ERISA and the common law.[11]

d. Respondents incorrectly assert (Resp. Br. 18) that Petitioners are seeking to impose "strict liability" on non-fiduciary parties in interest under § 502(a)(3). To be sure, *Congress* imposed "strict liability" on parties in interest under 26 U.S.C. § 4975 and ERISA § 502(i), both of which impose liabilities without regard to what the party in interest knew or should have known. Liability for equitable restitution under § 502(a)(3) is significantly *more* protective of parties in interest. As Petitioners have explained, Pet. Br. 30 n.15 (and as Respondents ultimately acknowledge, Resp. Br. 19), the law of equitable restitution contains built-in limitations that protect parties in interest. Specifically, equitable restitution pursuant to a constructive trust is generally available only if the party in interest (1) did not pay for

[11] Respondents' detour into the question whether, at common law, a trustee violated his fiduciary duty by causing a trust to enter into a transaction with a service provider (Resp. Br. 17) is thus a red herring. To the extent that common law rules are inconsistent with ERISA – as they plainly are under § 406(a) – they are irrelevant to the Court's inquiry. *See Varity*, 516 U.S. at 497.



the plan assets *or* (2) knew or should have known that the transaction was prohibited.[12]

## III. Interpreting ERISA In Accordance With Its Text Furthers The Principal Purpose Of The Statute.

1. As in *Varity*, "ERISA's basic purposes favor a reading of [the statute] that provides the plaintiffs with a remedy." 516 U.S. at 513. The "principal object" of ERISA "is to protect plan participants and beneficiaries." *Boggs*, 520 U.S. at 845. One of the principal means Congress adopted to achieve this object was "to bar categorically" prohibited transactions that Congress viewed as "likely to injure the pension plan." *Commissioner v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 160 (1993). Congress "provide[d] both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]." *Varity*, 516 U.S. at 512. By seeking to allow parties in interest to keep plan assets obtained in transactions that Congress

[12] Respondents err in asserting (Resp. Br. 19-22) that Petitioners have waived any argument that is not premised on a "direct" violation of § 406(a) by a non-fiduciary party in interest. Respondents do not dispute that the Question Presented in the Petition (like the question certified to the court of appeals) fairly includes the question whether a party in interest who engages in a prohibited transaction can be sued under § 502(a)(3) because the transaction is an "act or practice which violates" § 406(a), and restitution is "appropriate equitable relief" to "redress" the violation. *See* Pet. Reply Br. 3 n.2. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). Moreover, Count II of Petitioners' Complaint is not "the sole count before this Court." Resp. Br. 5. Under 28 U.S.C. § 1292(b), an appellate court may address "any issue fairly included within the certified order." *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 205 (1996). The certified order in this case dismissed Count III (and Count II to the extent it is "premised on an alleged breach of fiduciary duty"). J.A. 324. In any event, Respondents place too much weight on a sentence fragment from Petitioners' brief in the court of appeals *See* Resp. Br. 21. The full sentence clarifies Petitioners' position: "Because [§ 502(a)(3)] unambiguously authorizes suits to redress ERISA violations, Salomon's argument ... depends entirely on the meaning of [§ 406(a)]." Pet. C.A. Br. 18.

intended to "bar categorically," Respondents would undermine ERISA's principal purpose.

2. As Petitioners' opening brief explains (Pet. Br. 33-39), ERISA's excise tax and civil penalty provisions are not adequate to prevent or redress all prohibited transactions. Respondents deny (Resp. Br. 39) that Petitioners have submitted any evidence of "an enforcement gap." Not so. Petitioners, Respondents' *amici*, and even Respondents' own *counsel,* have referred to data showing that total receipts from the first-tier excise tax are minuscule compared to the nearly $5 trillion in assets in nearly 700,000 tax-qualified pension plans in the U.S.[13] Moreover, a congressional committee has concluded that, as plan assets have multiplied and the number of plans has increased, "the Department of Labor has become increasingly less able to fulfill its responsibility to detect and deter abuse of plan assets." H.R. Conf. Rep. No. 101-386, at 432 (1989).[14] As the Solicitor General recognizes (U.S. Br. 2), "[b]ecause of the 'enormity of the task' of enforcing the guarantees of ERISA, private civil actions under § 502(a)(3) are a necessary complement to actions by the Secretary." The idea that government enforcement alone is sufficient is wishful thinking.

3. Respondents and their *amici* predict that various dire results will ensue unless the court of appeals' decision is affirmed. *See*, *e.g.*, BMA Br. 8-12 (forecasting disruption of the established business practices of financial institutions, increased costs of administering plans, decreased investment opportunities, and harm to U.S. capital markets). If these Chicken-Little statements were true,

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[13] *See* Pet. Br. 36 n.20; BMA Br. 11; Peter C. Hein, *Excise Tax Enforcement Under Code Section 4975*, *in* Pension Plan Investments: Confronting Today's Investment Issues, at 877, 892 (PLI 1997) ("[V]ery modest revenues are realized (and are expected in the future) from the § 4975(a) tax.").

[14] The Pension and Welfare Benefits Administration has "fewer than 400 investigators" to investigate "civil and criminal violations relating to employee benefit plans.... For this reason, a 1995 report by the Brookings Institution referred to PWBA as *probably the most highly leveraged agency in the U.S. Government*." 65 Fed. Reg. 18,208 (Apr. 6, 2000) (emphasis added; citation omitted).



the sky would have fallen long ago. Non-fiduciary parties in interest are clearly subject to punitive excise taxes or civil penalties for engaging in prohibited transactions. Moreover, the law in *every* circuit to have considered the issue, prior to the court of appeals' decision in this case, was (and is) that non-fiduciary parties in interest *are* subject to actions for equitable restitution under § 502(a)(3). *See* Pet. 9-10. Despite these rules, none of the dire consequences predicted by Respondents and their *amici* has come to pass. To the contrary, pension plans have abundant investment opportunities, and hold "an estimated 20% of all outstanding stocks and 17% of all outstanding bonds." BMA Br. 11.[15]

Respondents and their *amici* warn (Resp. Br. 42-43; BMA Br. 13-15) that many of the exemptions to ERISA's prohibited transaction provisions are technical and dependent on information beyond the knowledge of non-fiduciary parties in interest. Again, both fiduciaries and non-fiduciary parties in interest are *already* required to cope with these problems to avoid liability for prohibited transaction penalties and excise taxes. For example, because of the broad definitions of party in interest and disqualified person, *see* ERISA § 3(14); 26 U.S.C. § 4975(e)(2), it can be difficult for a fiduciary to determine whether another party is a party in interest or disqualified person. Similarly, the application of prohibited transaction exemptions sometimes depends on information known to one party, but not the other.[16] In practice,

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[15] Respondents' complaint (Resp. Br. 44) that Petitioners' interpretation of § 502(a)(3) would allow a suit against "any person ... for some other person's violation of Title I" is greatly overstated. The text of § 502(a)(3) circumscribes itself by authorizing only "appropriate equitable relief" to "redress" a violation of Title I. Section 502(a)(3) does not subject non-fiduciaries to open-ended liability for damages, but instead is limited to equitable restitution in situations where a non-fiduciary would be unjustly enriched if allowed to retain plan assets and profits.

[16] *See, e.g.*, ERISA § 408(b)(1) and 26 U.S.C. § 4975(d)(1) (exemption for receipt of a loan by party in interest or disqualified person depends on information possessed by plan fiduciary); ERISA § 408(b)(5) and 26 U.S.C. § 4975(d)(5) (exemption for contracts with insurance companies depends on information possessed by party in interest or disqualified person).

fiduciaries and parties in interest navigate these provisions by requiring the parties with whom they deal to give appropriate representations, warranties, and indemnifications.[17]

4. Respondents suggest (Resp. Br. 41) that allowing a fiduciary to "shift liability" for § 406(a) violations to a party in interest "could dilute the force of the statutory proscription that a 'fiduciary ... shall not cause' a plan to engage" in prohibited transactions. That simply is not so. Whether or not a fiduciary brings suit under § 502(a)(3) seeking "appropriate equitable relief" from a party in interest, the fiduciary remains fully liable for its own violations – both in damages *and* in restitution – in suits brought by any plan participant or beneficiary or the Secretary of Labor pursuant to § 502(a)(2). The availability of attorneys fees under § 502(g) provides an additional incentive to bring such suits where they are warranted.

It is *Respondents'* position, not Petitioners', that has "unsettling consequences." Resp. Br. 42. If Respondents' position were adopted, non-fiduciary parties in interest that engage in prohibited transactions with tax-qualified plans would be shielded from civil liability under Title I of ERISA. That would mean, for example, that a non-fiduciary service-provider that sells worthless investments to a plan will be immune from Title I liability.

## IV. The Legislative History Of ERISA Is Consistent With The Statutory Language.

The court of appeals properly "hesitate[d] to give too much weight to legislative history." J.A. 353. As shown above, the language of § 502(a)(3) is unambiguous, and therefore the Court should decline Respondents' invitation to "resort to legislative history to cloud a statutory text that is clear." *Ratzlaf v. United*

[17] *See, e.g.*, Pension Plan Investments, *supra* note 13 at 23, 125-29. As for Respondents' complaints about the technical nature of the exemptions, sophisticated financial institutions (such as Respondents) and their counsel appear to be able to cope with them, *see generally id.*, and are required to do so in any event.



*States*, 510 U.S. 135, 147-48 (1994). In any event, the legislative history is consistent with the statutory text.

1. As the court of appeals recognized, the statement in the Conference Report that "the conference substitute prohibits plan fiduciaries *and parties-in-interest* from engaging in a number of specific transactions" "impl[ies] that *both* parties to the transaction would be liable." J.A. 352 (quoting H.R. Conf. Rep. No. 93-1280, at 306 (1974), 3 Leg. Hist. 4573)) (emphasis added). Respondents nevertheless focus on an unenacted provision of the Senate bill that would have expressly subjected parties in interest to liability for engaging in prohibited transactions. Resp. Br. 27-28.

The Senate provision would have made parties in interest "personally liable" for *damages*. *See* H.R. 2, 93d Cong. § 511, 3 Leg. Hist. 3780. As noted above, unlimited personal liability for direct and consequential damages is quite different from limited liability to make equitable restitution. The fact that a proposal to make parties in interest personally liable in damages was not ultimately enacted thus is not probative of the question whether parties in interest may be required to disgorge ill-gotten gains.[18]

2. In an effort to prop up their shaky argument from congressional inaction, Respondents resort to an even shakier argument based on a *divided* congressional *staff* recommendation. Resp. Br. 5-6, 28, 33). The staff recommendation does not represent the views of even a single elected member of Congress, was couched in the form of a suggestion (that the conferees "*may* wish to adopt the approach of the House bill and not provide civil liability for parties-in-interest"), and included a footnote (omitted from Respondents' brief) stating that "[n]ot all the staff agree with this suggestion." J.A. 282. If the Court wishes to consider recommendations, it should look to the recommendation of the

[18] Reliance on a so-called "rejected proposal" is particularly suspect where, as here, the proposal "rejected" is considerably different from the interpretive question at issue *See, e.g.*, *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 664-65 (1978) (overruling *Monroe v. Pape*, 365 U.S. 167 (1961), based on *Monroe*'s inappropriate reliance on a rejected legislative proposal).

Executive Branch: "The Secretary of Labor should have authority to bring an action against parties in interest who participate in a prohibited transaction as well as against fiduciaries alleged to have breached their responsibilities under the Act." Administration Recommendations to the House and Senate Conferees on H.R. 2 To Provide Pension Reform at 9 (1974), 3 Leg. Hist. 5047, 5060.

3. Respondents' reliance on the "rejected" Senate proposal is further undermined by the fact that crucial language in the "catch-all" provision ultimately enacted as § 502(a)(3) originated in the *Senate* bill. *See* Pet. Br. 41-42. The House bill included a provision that authorized civil actions "by the Secretary, or by a participant, beneficiary, or fiduciary to enjoin any act or practice which violates any provision of this title." H.R. 2, 93d Cong. § 503(e)(3), 3 Leg. Hist. 4047. The House provision differs from the enacted version of § 502(a)(3) of ERISA in a critical respect: it does not include language authorizing "appropriate equitable relief" to "redress" any violation of Title I. That language was modeled on provisions in the Senate bill authorizing "appropriate relief, legal or equitable" and "such other relief as may be appropriate to effectuate the purposes of the Act." H.R. 2, 93d Cong. §§ 692, 693, 3 Leg. Hist. 3815-16.

The fact that several features of the Senate proposal were not ultimately enacted – namely, a provision expressly making parties in interest personally liable for damages as well as restitution (Senate bill § 511) and a provision expressly permitting suits "against any person who has ... received any assets of the plan" (Senate bill § 693) – is hardly fatal to Petitioners' argument. As Respondents acknowledge (Resp. Br. 28), the conferees compromised by adopting some of the features of the Senate proposal, including the Senate's provisions for excise taxes and civil penalties. The compromise also included the insertion of language into § 502(a)(3), drawn from the Senate bill, authorizing "appropriate equitable relief" to "redress" violations of ERISA.

4. Respondents also rely on statements that "[t]he labor law provisions [in Title I] apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries," while "[t]he tax law provisions [in Title II] apply an excise tax on disqualified persons." H.R. Conf. Rep. No. 93-1280, at 295



(1974), 3 Leg. Hist. 4562. The Conference Report states that "[t]his division corresponds to the basic difference in focus of the two departments." *Id.* These statements hardly provide an adequate basis for departing from the plain language of § 502(a)(3). Although the "focus" of the "labor law provisions" may be "rules and remedies under traditional trust law to govern the conduct of fiduciaries," that is not the *exclusive* focus of those provisions, as shown by § 502(i). Furthermore, applying the "traditional trust law" remedy of equitable restitution to undo a transaction caused by fiduciary misconduct falls within the "focus" of the labor provisions.[19]

## V. This Court's Decisions Do Not Support A Departure From The Statutory Text.

In *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993), the Court observed that, while no provision of ERISA explicitly requires a non-fiduciary to avoid participation in a fiduciary's breach of fiduciary duty under § 409, ERISA "contains various provisions that can be read as imposing obligations upon nonfiduciaries." *Id.* at 253-54. Respondents suggest (Resp. Br. 36) that the "provisions" to which this Court was referring are § 502(i) and § 4975. But that is not what the Court said. To the contrary, the Court cited § 406(a) as an "example" of a "provision[] that can be read as imposing obligations upon nonfiduciaries." *Mertens*, 508 U.S. at 253-54 & n.4. Under § 406(a), the Court noted, "a person who provides services to a plan is a 'party in interest' ... and may not ... engage in certain other transactions with the plan ...." *Id.*

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[19] In amending ERISA in 1989 to add § 502(*l*), the conferees stated:

> [T]he need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their power to fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well.

H.R. Conf. Rep. No. 101-386, at 432-33 (1989).

The distinction this Court suggested in *Mertens* between participation-in-fiduciary-breach claims and prohibited-transaction claims is valid.[20] As Petitioners have explained (Pet. Br. 46), the fiduciary-duty provisions at issue in *Mertens* differ from § 406 in an important respect: whereas there are no necessary counter-parties to a fiduciary breach, a party-in-interest *is* a necessary counter-party to a transaction between a plan and a party in interest.[21] Even if the Court were to conclude that an "explicit[]" congressional statement providing for non-fiduciary liability is necessary in the absence of *any* provision that requires a non-fiduciary to avoid participating in a fiduciary breach, it would not follow that such a statement is necessary where the non-fiduciary is, by definition, an essential party to the prohibited transaction (and is explicitly subject to punitive excise taxes and civil penalties for participating in the transaction).[22]

The Court's decision in *Central Bank v. First Interstate Bank*, 511 U.S. 164 (1994), concerns § 10(b) of the Securities Exchange Act of 1934, not ERISA. Moreover, the basic principle reaffirmed in *Central Bank* – that "the text of the statute controls" the liability inquiry, *id.* at 173 – supports Petitioners' interpretation of

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[20] *See also Nieto v. Ecker*, 845 F.2d 868 (9th Cir. 1988) (in which Judge Kozinski's opinion for the court adopted the same distinction by refusing to recognize a party in interest's liability under § 409 for "knowing participation," but recognizing its liability under § 406(a) and allowing suit under § 502(a)(3) for equitable relief).

[21] Respondents observe that a party in interest is not a necessary counter-party to every type of transaction prohibited by § 406. That is true, but irrelevant to the appropriate treatment of prohibited transactions, like those at issue here, that *do* necessarily involve a party in interest.

[22] *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996), expressly reserved the question presented in this case. *Lockheed* held that there is no violation of § 406(a) unless a fiduciary causes the plan to engage in a prohibited transaction; this case has been litigated on the assumption that the plans' investment manager (a fiduciary) caused the plans to enter into prohibited transactions. *See* Pet. Br. 47-48. *Peacock v. Thomas*, 516 U.S. 349 (1996), also cited by Respondents, involved "no violation of ERISA or of the plan." *Id.* at 353.



§ 502(a)(3). Were the Court to look for securities-law analogues to this case, a far more appropriate comparison would be to *Dirks v. SEC*, 463 U.S. 646 (1983). In *Dirks*, the Court held that a "tippee" acquires a "duty" under § 10(b) to abstain from trading on inside information when "the insider has breached his fiduciary duty to shareholders" by disclosing information to the tippee and "the tippee knows or should know that there has been a breach." *Id.* at 660. Notably, the Court cited trust-law principles to explain the tippee's duty: A "third person [who] ... had notice of the [fiduciary's] violation of duty, holds upon a constructive trust for the beneficiary any profit which he makes through the use of such information." *Id.* at 661 n.20 (quoting 3 L. Loss, *Securities Regulation* 1451 (2d ed. 1961)). Salomon, as a party in interest who has reaped a $20 million windfall by virtue of its participation in a prohibited transaction, stands in the same position as the hypothetical tippee in *Dirks*, and thus has a duty to pay restitution.

## VI. Salomon's "Independent Ground" For Affirmance Is Illusory.

Tacked onto Respondents' brief as an asserted "independent ground" for affirmance is an argument that, assuming non-fiduciary parties in interest may be sued for restitution under § 502(a)(3) to remedy a violation of § 406(a), Petitioners have not adduced evidence that Respondents "knew" that any fiduciary was violating § 406(a). Resp. Br. 47. The court of appeals did not consider this argument, and this Court need not do so either. In the very case cited by Respondents, the Court "decline[d] to decide" a "scienter" issue not reached by the court of appeals. *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 79 (1994).

As a *legal* matter, Respondents' assertion that a party in interest's *actual* knowledge of the fiduciary's violation "must be an element" of an action under § 502(a)(3) is unfounded. In support of their assertion, Respondents resurrect the straw man of "strict liability." As Petitioners have shown, *see supra* pages 8-9 n.9, 10-11, the common law of restitution generally imposes a "knows or

should know" standard on parties in possession of trust assets obtained through a breach of trust.[23]

As a *factual* matter, the district court – the only court to have considered the issue – held that there is sufficient evidence in the record to support the conclusion that Respondents satisfied a constructive knowledge requirement. *See* J.A. 311; *see also* Pet. Reply Br. 6; C.A. Supp. App. 95-104, 108-09, 250, 381-84. This is not the appropriate forum for review of that factual determination.

**Conclusion**

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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April 2000

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[23] Respondents' reliance on the "knowing participation" standard applicable to co-fiduciaries under § 405(a) is likewise misplaced. Sections 409 and 502(a)(2) make fiduciaries "personally liable" in *damages* for knowingly participating in another fiduciary's breach. It does not follow that the same knowledge requirement applies to the far more limited remedy of *equitable restitution*.

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No. 99-579

# In the Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, ETC., ET AL.,
PETITIONERS

*v.*

SALOMON BROTHERS, INC., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

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## QUESTION PRESENTED

Whether a civil action under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), to obtain "appropriate equitable relief" to "redress" any "act or practice which violates" Title I of ERISA, may be brought to obtain restitution from a nonfiduciary party in interest that engaged in a transaction prohibited by Section 406(a) of ERISA, 29 U.S.C. 1106(a).

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# In the Supreme Court of the United States

No. 99-579

HARRIS TRUST AND SAVINGS BANK, ETC., ET AL.,
PETITIONERS

*v.*

SALOMON BROTHERS, INC., ET AL.

*ON WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE SEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONERS

### INTEREST OF THE UNITED STATES

This case arises out of a suit filed by petitioners, as trustees of an employee benefit plan, to obtain restitution from respondent Salomon Brothers under Section 502(a)(3) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1132(a)(3), to redress a violation of ERISA's prohibition against certain transactions between a benefit plan and a party in interest with respect to the plan. See ERISA § 406(a), 29 U.S.C. 1106(a). The question presented is whether a party in interest who is not a fiduciary of the plan but who engages in a prohibited transaction with the plan is subject to suit under Section 502(a)(3) for restitution of the gains it realized as a result of the transaction.

Section 502(a)(3) authorizes civil actions to be brought by plan participants, beneficiaries, and fiduciaries to obtain "appropriate equitable relief" to redress violations of the Act. The Secretary of Labor is authorized to bring the same types of suits under Section 502(a)(5) of ERISA, 29 U.S.C.

1132(a)(5), and the Secretary has invoked that authority to sue parties in interest that violate ERISA's prohibited-transaction rules. See, *e.g.*, *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1421 (11th Cir. 1998), cert. denied, 525 U.S. 1140 (1999); *Reich* v. *Compton*, 57 F.3d 270, 285 (3d Cir. 1995). This Court's interpretation of Section 502(a)(3) therefore may affect the scope of the Secretary's authority under Section 502(a)(5). In addition, the Secretary is charged with the administration and enforcement of Title I of ERISA, 29 U.S.C. 1101 *et seq.*, including the assessment of civil penalties against parties in interest that engage in prohibited transactions with a plan and obtaining correction of such transactions. See 29 U.S.C. 1132(i) and (*l*), 26 U.S.C. 4975(h). Because of the "enormity of the task" of enforcing the guarantees of ERISA, private civil actions under Section 502(a)(3) are a necessary complement to actions by the Secretary. Cf. *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 211 (1972). The United States therefore has a substantial interest in the sound interpretation of Section 502(a)(3) of ERISA.

## STATEMENT

1. a. The Employee Retirement Income Security Act of 1974, 29 U.S.C. 1001 *et seq.*, is a complex statutory scheme crafted to establish safeguards for the operation and administration of employee benefit plans and to ensure their financial soundness. 29 U.S.C. 1001(a). Congress intended to protect the interests of plan participants and beneficiaries by, *inter alia*, "providing for appropriate remedies, sanctions, and ready access to the Federal courts." 29 U.S.C. 1001(b).

The civil enforcement provisions of ERISA are set forth in Section 502, 29 U.S.C. 1132. Subsection (a) of Section 502, entitled "Persons empowered to bring a civil action," identifies nine types of causes of action that may be brought by various specified persons. The civil action in this case was



brought under Section 502(a)(3), which provides that an action may be brought—

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of [Title I of ERISA] or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of [Title I of ERISA] or the terms of the plan.

29 U.S.C. 1132(a)(3).

Title I of ERISA, 29 U.S.C. 1001-1169, relates to the protection of employee benefit rights. Title I includes Section 406 of ERISA, 29 U.S.C. 1106, entitled "Prohibited transactions." Subsection (a) of Section 406, entitled "Transactions between plan and party in interest," states that, except as provided in Section 408, 29 U.S.C. 1108—

> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a).

29 U.S.C. 1106. Section 408 in turn sets forth various statutory exemptions from the prohibited-transaction rules in Section 406 and authorizes the Secretary to grant additional administrative exemptions, after affording public notice and an opportunity to comment. See 29 C.F.R. 2570.30-2570.52 (procedures for considering exemption applications).

b. ERISA defines a "fiduciary" as a person (1) who exercises discretionary authority or control respecting management of the plan or management or disposition of plan assets; (2) who renders, or has the authority or responsibility to render, investment advice for compensation regarding money or property of the plan; or (3) who has discretionary authority or responsibility in the administration of the plan. 29 U.S.C. 1002(21)(A). The term "party in interest" includes, *inter alia*, any fiduciary, counsel, or employee of a plan; a person providing services to the plan; an employer or employee organization any of whose employees or members are covered by the plan; a corporation or other entity that is owned by such a person; an employee, officer, or director of, or owner of a specified financial interest in, such a person; and a partner or joint venturer of such a person. 29 U.S.C. 1002(14).

2. Petitioner Ameritech Corporation sponsors and administers two pension plans whose assets are held in trust by Ameritech Pension Trust (APT). Petitioner Harris Trust and Savings Bank is a trustee of APT. National Investment Services of America (NISA) was an investment manager for APT during the relevant time period. The two pension plans qualify as employee benefit plans under ERISA. Both petitioners and NISA, by virtue of their relationships with APT, were at all relevant times fiduciaries of the plans within the meaning of ERISA. See 29 U.S.C. 1002(21)(A); Pet. App. 16a-17a.[1]

[1] This case comes to the Court based on rulings by the district court on cross-motions for summary judgment. In ruling on those motions, the district court viewed the evidence in the non-moving party's favor and did not make findings of fact. Pet. App. 56a. Our statement of facts is based on the lower courts' recitations. Respondents have reserved the right to dispute certain facts should the case go to trial. *Id.* at 6a.



Respondents, Salomon Brothers, Inc., and Salomon Brothers Realty Corp. (collectively "Salomon"), provided securities-brokerage and other services to APT during the relevant time period. Pet. App. 2a, 17a. Accordingly, Salomon was a party in interest with respect to the plans within the meaning of ERISA. See 29 U.S.C. 1002(14)(B).

In 1987, Salomon offered to sell to APT its interest in a written fee agreement that granted Salomon various rights, including participation in the net cash flow, sale or refinancing proceeds, and property appreciation associated with certain hotel properties. Pet. App. 17a-18a. On October 28, 1987, APT, at the direction of NISA, purchased 95% of the fee agreement. APT, through NISA, purchased 100% of a second fee agreement from Salomon in 1988, and 95% of two other fee agreements in 1989. APT paid a total of approximately $20,915,000 for the four fee agreements. *Id.* at 2a, 17a-19a. Petitioners allege that Salomon failed to disclose information about the properties that would have alerted petitioners to the precarious condition of the investments, and that, contrary to Salomon's representations, the fee agreements were virtually worthless when they were acquired by APT. *Id.* at 19a.

The issuers of the fee agreements subsequently went into bankruptcy. Pet. App. 19a. Petitioners contend that, as a result, APT lost $19,889,602, while Salomon realized a $20,915,000 profit on the transactions. Pet. 8.

3. Petitioners brought the instant suit against Salomon alleging violations of various state and federal laws, including several provisions of ERISA. Pet. App. 14a. The parties filed motions and cross-motions for summary judgment with

respect to various portions of the second amended complaint (complaint) and certain counterclaims. *Id.* at 14a-15a.

On June 13, 1996, the district court entered an order granting Salomon summary judgment on Count I of the complaint, which alleged breach of fiduciary duty, based on the court's determination that Salomon was not a fiduciary of the plan within the meaning of ERISA. Pet. App. 20a-30a. The court then turned to the question whether, even though Salomon was not a fiduciary, it was nonetheless subject to suit under Section 502(a)(3) as a nonfiduciary party in interest. Specifically, the court considered whether petitioners have a cause of action against Salomon for restitution under Section 502(a)(3) based on either Salomon's participation in a transaction prohibited by Section 406 of ERISA, 29 U.S.C. 1106 (Count II), or Salomon's knowing participation in the breach of fiduciary duty by NISA that occurred when NISA caused the transaction prohibited by Section 406 (Count III). The district court ruled in petitioners' favor on Count II (Pet. App. 30a-51a) and in respondents' favor on Count III (*id.* at 51a-52a).

With regard to Count III, the court relied on controlling circuit precedent, *Reich* v. *Continental Casualty Co.*, 33 F.3d 754 (7th Cir. 1994), cert. denied, 513 U.S. 1152 (1995). *Continental Casualty* in turn followed dicta in this Court's opinion in *Mertens* v. *Hewitt Associates*, 508 U.S. 248 (1993), where the majority found it "far from clear" that Section 502(a)(3) of ERISA generally provides a cause of action against a nonfiduciary that knowingly participates in a fiduciary's breach of its duties to the plan, because no provision of ERISA explicitly imposes a duty on nonfiduciaries to refrain from such participation. See 508 U.S. at 253-255 & n.5. The district court in this case therefore concluded that "ERISA does not provide a cause of action against nonfiduciaries for knowing participation in another person's fiduciary breaches." Pet. App. 51a.



The district court explained that its holding that petitioners do not have a cause of action under Count III did not require a similar conclusion with respect to Count II. The court reasoned that "nonfiduciary parties in interest may be held liable under § 1132 for their own involvement in a prohibited transaction because § 1106 can be read to affirmatively impose an obligation on parties in interest to avoid such transactions. Their status as a nonfiduciary party in interest, however, does not subject such persons to derivative liability for another's violation of ERISA. Thus, to the extent that Salomon participated in a prohibited transaction, it may be found directly liable under count II." Pet. App. 51a-52a. The court noted that this Court in *Mertens* "specifically contrasted the absence of any provision giving rise to a nonfiduciary's duty to avoid 'knowing participation,' with other provisions which, it recognized, can be read to impose an obligation on nonfiduciary parties in interest to avoid participation in § 1106(a) transactions." *Id.* at 33a (citing *Mertens*, 508 U.S. at 254 & n.4). The court also pointed out that the legislative history of ERISA "reflects a congressional intent to obligate nonfiduciary parties in interest to abstain from participation in § 1106(a) transactions." *Id.* at 34a.

Against this background, the district court held that Section 502(a)(3) of ERISA affirmatively authorizes a private civil action to obtain appropriate equitable relief, including restitution, from a nonfiduciary party in interest that violates Section 1106(a). Pet. App. 35a-41a. The court emphasized that the fact "[t]hat § 1132(a)(3) does not identify specific categories of potential defendants makes it clear that it was intended to authorize suit against any entity that violates ERISA," which a nonfiduciary party in interest does by engaging in a prohibited transaction. *Id.* at 36a. The court also pointed out that the courts of appeals that had addressed the issue had "uniformly found that ERISA's civil

enforcement provision, 29 U.S.C. § 1132, provides the requisite authority" for a suit against a nonfiduciary party in interest. *Id.* at 35a-36a (citing *Reich* v. *Stangl*, 73 F.3d 1027, 1032 (10th Cir.), cert. denied, 519 U.S. 807 (1996); *Landwehr* v. *Dupree*, 72 F.3d 726, 734 (9th Cir. 1995); *Reich* v. *Compton*, 57 F.3d 270, 285 (3d Cir. 1995); *Reich* v. *Rowe*, 20 F.3d 25, 31 n.7 (1st Cir. 1994)).[2]

4. The district court certified its order regarding Count II for interlocutory appeal under 28 U.S.C. 1292(b), Pet. App. 62a-65a, and the court of appeals reversed. *Id.* at 1a-13a. The court of appeals acknowledged that Section 502(a)(3) of ERISA "allows plan fiduciaries like [petitioners] to seek 'other appropriate equitable relief' for any act which violates ERISA." Pet. App. 7a. The court ruled, however, that the prohibited-transaction rules in ERISA Section 406 regulate only the conduct of fiduciaries and do not regulate the conduct of nonfiduciary parties in interest or impose any explicit duty on them. In reaching that conclusion, the court relied on the placement of Section 406 in a part of ERISA entitled "Fiduciary Responsibility," and on the wording of Section 406, which states that "a fiduciary * * * shall not

[2] The district court rejected Salomon's argument that, under Seventh Circuit precedent, restitution is not available as an equitable remedy in this case. Pet. App. 41a (emphasizing that limiting restitution to an equitable remedy in cases involving participation in a fiduciary breach "would be inappropriate in light of traditional trust law which provides rules permitting equitable actions to regain improperly transferred trust property for reasons other than the recipient's knowing participation in the trustee's breach of its fiduciary duties"). The court also rejected Salomon's argument regarding failure of proof (*id.* at 41a-42a), denied petitioners' motion for summary judgment insofar as it sought to establish the inapplicability of a prohibited-transaction exemption for security transactions because it found genuine issues of material fact on that question (*id.* at 44a-51a), concluded that a ruling on Salomon's statute-of-limitations defense would be premature (*id.* at 52a-53a), and granted summary judgment to petitioners on Salomon's counterclaims for contribution (*id.* at 53a-54a).



cause" the plan to engage in a prohibited transaction. *Ibid.* The court also reasoned that the fact that Section 406 "mentions 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction." *Id.* at 8a; see also *id.* at 7a. The court therefore found no material distinction between this case and *Continental Casualty*, in which the Seventh Circuit held "that where ERISA does not expressly impose a duty, there can be no cause of action." *Id.* at 8a.

The court of appeals rejected petitioners' attempt to distinguish this case from *Continental Casualty* on the ground that Section 502(i) of ERISA, 29 U.S.C. 1132(i), authorizes the Secretary of Labor to impose civil penalties on a party in interest that engaged in a transaction prohibited by Section 406. In the court's view, the provision for civil penalties in this situation "only makes the absence of a specific provision imposing civil liability on parties in interest all the more striking." Pet. App. 9a. The court also found it significant that when Congress enacted the final bill into law, it dropped a provision in the Senate bill that would have explicitly imposed liability on parties in interest that participate in violations of the Act. *Id.* at 12a.

## SUMMARY OF ARGUMENT

A. Section 502(a)(3) of ERISA authorizes a civil action to be brought by a plan participant, beneficiary, or fiduciary "to enjoin any act or practice which violates any provision" of Title I of ERISA and "to obtain other appropriate equitable relief * * * to redress such violations." 29 U.S.C. 1132(a)(3). The text of Section 502(a)(3) is not limited to suits against fiduciaries; it also readily embraces suits against nonfiduciary parties in interest that engage in transactions prohibited by Section 406(a) in Title I of ERISA, 29 U.S.C. 1106(a). Such a transaction plainly constitutes a "vio-

lation" of ERISA and can, therefore, be redressed through a Section 502(a)(3) civil action.

B. The overall structure of ERISA's prohibited-transaction provisions confirm that conclusion. Section 3003 of ERISA, 29 U.S.C. 1203, which requires coordination of enforcement efforts by the Secretary of Labor and the Secretary of the Treasury with respect to prohibited transactions, expressly states that a party in interest that engages in a prohibited transaction is "violating" Section 406. The civil penalty provision in Section 502(i) of ERISA, 29 U.S.C. 1132(i), and its companion tax provision, 26 U.S.C. 4975, expressly contemplate "correction" of a prohibited transaction by the party in interest, and thereby establish that a party in interest is not entitled to retain plan assets or profits it improperly acquired in such a transaction. And another civil penalty provision, in Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*), establishes that Section 502(a)(5), which authorizes the Secretary to bring civil actions on essentially the same terms as private parties under Section 502(a)(3), enables the Secretary to bring suit for equitable relief against a nonfiduciary party in interest that engaged in a prohibited transaction with the plan. Because the relevant statutory language in the two provisions is identical, Section 502(a)(3) should be similarly interpreted.

The civil penalty provisions reflect ERISA's preference that a prohibited transaction be remedied by restoration of the plan's financial resources rather than through a civil penalty or tax—a preference that furthers the central purpose of ERISA to safeguard and ensure the financial soundness of employee benefit plans. 29 U.S.C. 1001(a). An interpretation of Section 502(a)(3) (or Section 502(a)(5)) that precluded suits for restitution from nonfiduciary parties in interest would contradict that statutory preference.

C. The court of appeals' holding that such suits may not be brought under Section 502(a)(3) conflicts with established



principles of trust law and equity, to which this Court looks when interpreting ERISA. Under those principles, appropriate equitable relief includes restitution of trust assets, generally through imposition of a constructive trust, from third-parties to whom trust property was transferred in breach of the trust. The ability to obtain restitution from a transferee of trust property is not based on the nonfiduciary's own breach of a legal duty, but rather on a theory of unjust enrichment.

D. The court of appeals' interpretation of Section 502(a)(3) was based, in part, on its erroneous belief that there is no material distinction between the issue in this case and the issue discussed by this Court in dicta in *Mertens* v. *Hewitt Associates*, 508 U.S. 248, 254 (1993), regarding whether Section 502(a)(3) provides for a cause of action against a nonfiduciary for knowing participation in a fiduciary breach. Even if the *Mertens* majority's doubts on the latter point were well founded, there would be no rationale for extending that conclusion to bar suits against parties in interest, and indeed later in the opinion the Court specifically distinguished the situation of parties in interest that violate Section 406's prohibited-transaction rules. *Id.* at 262.

E. The legislative history of ERISA, both as originally enacted and as amended in 1989 to add the civil penalty provision in Section 502(*l*), also supports an interpretation of Sections 502(a)(3) and (5) that authorizes civil actions for restitution against nonfiduciary parties in interest that engage in prohibited transactions with the plan.

## ARGUMENT

### SECTION 502(a)(3) OF ERISA PROVIDES A CAUSE OF ACTION FOR RESTITUTION AGAINST A NON-FIDUCIARY PARTY IN INTEREST THAT ENGAGED IN A TRANSACTION WITH THE PLAN THAT WAS PROHIBITED BY SECTION 406(a) OF ERISA

#### A. The Text Of Section 502(a)(3) And Section 406(a)

1. Section 502(a)(3) of ERISA states that a plan participant, beneficiary, or fiduciary may bring a civil action "to enjoin any act or practice which violates any provision" of Title I of the Act (the Title in which Section 406 is located), or "to obtain other appropriate equitable relief * * * to redress such violations." 29 U.S.C. 1132(a)(3). ERISA contains no language limiting that provision to suits against fiduciaries. Because Section 502(a)(3) does not specify or in any way limit the entities that may be sued, it authorizes suit against any entity from which appropriate equitable relief may be obtained to redress a violation of ERISA.[3]

A transaction that is prohibited by Section 406(a) of ERISA unquestionably constitutes a "violation" of ERISA. Section 406 flatly bars the specified types of transactions, subject to the statutory and administrative exemptions provided for in Section 408, 29 U.S.C. 1108. Congress entitled Section 406 "Prohibited transactions," and it entitled subsection (a) of that Section "Transactions between plan and

[3] Section 502(a)(3) also authorizes civil actions to enjoin any act or practice that violates the terms of a plan and to obtain other equitable relief to enforce any term of a plan. That provision also allows actions against defendants other than a fiduciary. See, *e.g.*, *Administrative Comm.* v. *Gauf*, 188 F.3d 767, 770-771 (7th Cir. 1999) (allowing Section 502(a)(3) claim against participant, under plan's subrogation provision, for reimbursement following participant's tort recovery); *Blue Cross & Blue Shield* v. *Sanders*, 138 F.3d 1347, 1353 (11th Cir. 1998) (same); *Southern Council of Indus. Workers* v. *Ford*, 83 F.3d 966, 969 (8th Cir. 1996) (same).



party in interest." That structure manifests an intent to render unlawful the specified transactions themselves, and not merely to impose a duty on fiduciaries. Although Section 406(a) expressly imposes on a fiduciary a duty not to cause the plan to engage in a prohibited transaction, "this in no sense lessens the fact that a transaction between a plan and a 'party in interest' remains a prohibited transaction under § 406"—a violation that can be redressed in a civil action under Section 502(a)(3) to obtain restitution to the plan or other appropriate equitable relief. *Herman* v. *South Carolina Nat'l Bank*, 140 F.3d 1413, 1421 (11th Cir. 1998), cert. denied, 525 U.S. 1140 (1999).

2. The court of appeals read Section 406(a) not to impose any duties on parties in interest, because Section 406(a) expressly imposes a duty on a fiduciary not to cause the plan to engage in a prohibited transaction with a party in interest, but does not address parties in interest in similar terms. Pet. App. 7a-8a. What the court of appeals failed to appreciate is that the imposition of an express duty on fiduciaries not to cause a plan to engage in prohibited transactions serves to make it clear that a fiduciary that breaches that duty is subject to suit not only for engaging in a prohibited transaction that violates the Act, but also for breach of fiduciary duty. A suit under Section 502(a)(2) for breach of fiduciary duty allows for recovery not only of equitable relief (which would be allowed as well in a suit under Section 502(a)(3) to obtain redress for a prohibited transaction), but also for recovery of legal damages. Section 502(a)(2) authorizes a suit by the Secretary (or by a plan participant, beneficiary, or fiduciary) for appropriate relief under Section 409 of the Act, which in turn provides that a fiduciary who "breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by [Title I of ERISA] shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such

plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate." 29 U.S.C. 1109(a). See *Lockheed Corp.* v. *Spink*, 517 U.S. 882, 888 (1996); *Mertens*, 508 U.S. at 252.

Moreover, to interpret Section 502(a)(3) based on what "duties" are or are not expressly imposed by Section 406(a) would ignore the plain language of Section 502(a)(3), which is couched in terms of suits to redress any act or practice that "violates" Title I of ERISA. A transaction prohibited by Section 406(a) plainly constitutes an "act or practice" that "violates" a provision of Title I of ERISA, and it therefore may properly be the subject of an action under Section 502(a)(3) to obtain "appropriate equitable relief" to "redress" that violation. Appropriate equitable relief in these circumstances includes relief not only against the fiduciary that caused the plan to engage in the prohibited transaction, but also against any other entity from which it would be appropriate to obtain equitable relief—certainly including a party in interest that itself engaged in the prohibited transaction and that was unjustly enriched by its improper receipt of plan assets. The term "redress" means "the setting right of what is wrong." *The Random House Dictionary of the English Language* 1617 (2d ed. 1987); see also *Webster's Third New International Dictionary* 1904 (1986). Accordingly, equitable relief appropriate to redress a violation of Section 406(a) "includes restitution of ill-gotten plan assets or profits." *Mertens*, 508 U.S. at 248.[4]

[4] The court of appeals erred in concluding that suits for violations of Section 406 should be limited to suits against fiduciaries because Section 406 appears in Part 4 of Title I of ERISA, which is captioned "Fiduciary Responsibility." Despite that caption, Part 4, which encompasses 29 U.S.C. 1101-1114, contains provisions that unquestionably impose duties on persons other than fiduciaries. For example, Section 411, 29 U.S.C. 1111, forbids individuals convicted of certain enumerated felonies from serving not only as plan fiduciaries but also as service providers. And Section 412, 29 U.S.C. 1112, requires the bonding of both plan fiduciaries and any other person who handles plan property. That Section also makes it unlawful for any person to purchase such bonds from a company in which the plan or any party in interest has a significant or controlling interest. 29 U.S.C. 1112(a) and (c).



### B. The Overall Structure Of ERISA's Prohibited-Transaction Provisions

Several other provisions of ERISA relating to prohibited transactions confirm that Congress viewed a nonfiduciary party in interest that engaged in a transaction prohibited by Section 406(a) as having committed a violation of ERISA and as obligated to make the plan whole.

1. Congress made this conclusion explicit in Section 3003 of ERISA, 29 U.S.C. 1203, which addresses the procedures that the Secretary of Labor and the Secretary of the Treasury must follow in order to ensure coordination of their duties with respect to prohibited transactions. Specifically, Section 3003(c) states:

> Whenever the Secretary of Labor obtains information indicating that a party-in-interest or disqualified person is violating section 1106 of this title [ERISA § 406], he shall transmit such information to the Secretary of the Treasury.

29 U.S.C. 1203(c). Section 502(a)(3), which authorizes civil actions to redress "any" act or practice that constitutes a "violation" of "any" provision of Title I of the Act, must be read in pari materia with that provision, which unequivocally treats a party in interest that engages in a transaction prohibited by Section 406 as "violating" that provision.

2. ERISA's civil penalty provisions reinforce the conclusion that a nonfiduciary party in interest is not a mere passive participant in a transaction prohibited by Section

406(a) that might therefore be permitted by ERISA to retain any profits it realizes from such a transaction, but rather is itself in violation of ERISA and therefore not entitled to retain plan assets or profits that unjustly enrich it.

a. Section 502(i) of ERISA, 29 U.S.C. 1132(i), provides that "[i]n the case of a transaction prohibited by [Section 406] by a party in interest with respect to a plan," the Secretary of Labor may assess a civil penalty against the party in interest. Under a parallel provision in Title II of ERISA, which is codified in the Internal Revenue Code (IRC), the Secretary of the Treasury may impose a tax on a prohibited transaction, to be paid by the "disqualified person" (defined in a manner substantially similar to "party in interest" under Title I) that engages in the prohibited transaction. 26 U.S.C. 4975(a); see generally *Commissioner* v. *Keystone Consol. Indus., Inc.*, 508 U.S. 152 (1993).[5]

[5] Whether it is the Secretary of Labor or the Secretary of the Treasury who has jurisdiction to assess a penalty or tax depends on whether the plan is a tax-qualified plan, and thus covered by 26 U.S.C. 4975(e)(1) (1994 & Supp. III 1997). See 29 U.S.C. 1132(i) (Subsection (i) does "not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26"). In general, pension plans are covered by 26 U.S.C. 4975, while welfare benefit plans are covered by 29 U.S.C. 1132(i). The tax provision defines "prohibited transaction" in a manner that is substantially similar to that in which Section 406 defines that term under Title I of ERISA. See 26 U.S.C. 4975(c) (1994 & Supp. III 1997). The tax provision also defines "disqualified person" in a manner that is substantially similar to that in which Section 3(14) of ERISA, 29 U.S.C. 1002(14), defines "party in interest" for purposes of Title I. See 26 U.S.C. 4975(e)(2).

The court of appeals erred in treating this case as one in which the Secretary of Labor could impose a civil penalty on respondents under 29 U.S.C. 1132(i). See Pet. App. 8a-9a. Because this case apparently involves a tax-qualified plan within the meaning of Section 4975(e)(1), respondents would be subject to imposition of a tax by the Secretary of the Treasury, but only after referral to the Secretary of Labor to provide her a reasonable opportunity to obtain a correction by respondents of the prohibited transaction. See 29 U.S.C. 4975(h).



The amount of the civil penalty or tax depends upon whether the transaction is "corrected" in a timely manner. Correcting a prohibited transaction means "undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards." 26 U.S.C. 4975(f)(5); accord 29 U.S.C. 1132(i) (providing for correction of a prohibited transaction by the party in interest "in such manner as the Secretary [of Labor] shall prescribe which shall be consistent with section 4975(f)(5) of title 26").[6] If the prohibited transaction is not corrected within 90 days after notice from the Secretary of Labor (or such longer time as the Secretary may permit), the penalty assessed against the party in interest may equal 100% of the amount involved in the transaction. 29 U.S.C. 1132(i); see also 26 U.S.C. 4975(b) (providing for assessment of 100% tax if the transaction is not corrected within the taxable period); *Keystone Consol. Indus.*, 508 U.S. at 155 n.1.[7] Thus, it is clear that Congress intended that parties in interest that engage in prohibited transactions would "correct" those transactions and thus would not be

[6] The procedures for assessment of civil sanctions by the Secretary of Labor under Section 502(i) are set forth at 29 C.F.R. 2570.1 to 2570.12. Those procedures afford the party in interest an opportunity for a hearing, an administrative appeal, and judicial review pursuant to the Administrative Procedure Act, 5 U.S.C. 704. See 29 C.F.R. 2570.1, 2570.8(b), 2570.10, 2570.12(b). The 90-day correction period under Section 502(i) ends 90 days after the final agency order with respect to the transaction or, if the party in interest seeks judicial review of a final agency order, 90 days after the entry of a final order in the judicial action. See 29 C.F.R. 2560.502i-1(d).

[7] If the prohibited transaction is corrected in a timely manner, the tax shall not exceed 15% of the amount of the transaction for each year (or part thereof) in the taxable period, 26 U.S.C. 4975(a) (Supp. III 1997), and the civil penalty shall not exceed 5% of the amount of the transaction for each year (or part thereof) during which the prohibited transaction continues, 29 U.S.C. 1132(i).

entitled to remain unjustly enriched as a result of such transactions. Disgorgement or restitution by a party in interest therefore is "appropriate equitable relief" under Section 502(a)(3) to "redress" the prohibited transaction.

b. Another civil penalty provision, in Section 502(*l*) of ERISA, 29 U.S.C. 1132(*l*), strongly reinforces that conclusion. Section 502(*l*) makes clear that Section 502(a)(5), 29 U.S.C. 1132(a)(5), which authorizes the Secretary of Labor to bring a civil action on the same terms as a plan participant, beneficiary, or fiduciary may bring an action under Section 502(a)(3) to redress a violation of the Act, enables the Secretary to bring suit against a nonfiduciary party in interest to obtain restitution to the plan to remedy a prohibited transaction.

Section 502(*l*), which was added to ERISA in 1989 (Pub. L. No. 103-239, § 2101(a), 101 Stat. 2123), provides for a civil penalty that applies to a broader category of violations than does Section 502(i). It authorizes the Secretary of Labor to assess a civil penalty in the case of "(A) any breach of fiduciary responsibility under (or other violation of) part 4" of Title I of ERISA "by a fiduciary," or "(B) any knowing participation in such a breach or violation by any other person." 29 U.S.C. 1132(*l*)(1)(A) and (B). Violations of Part 4 of Title I include violations of the prohibited-transaction rules in Section 406(a). The civil penalty is equal to 20% of the "applicable recovery amount." 29 U.S.C. 1132(*l*)(1). The latter term is defined to mean "any amount which is recovered from a fiduciary *or other person* with respect to a breach or violation described in paragraph (1)," either "(A) pursuant to any settlement agreement with the Secretary," or "(B) ordered by a court to be paid by such fiduciary *or other person* to a plan or its participants and beneficiaries *in a judicial proceeding instituted by the Secretary under subsection* (a)(2) or *(a)(5)* of this section." 29 U.S.C. 1132(*l*)(2) (emphasis added). Subsection (a)(2) of Section 502 authorizes the Secretary (or a plan participant, beneficiary, or fiduciary) to bring a civil action against a fiduciary for appropriate relief under Section 409 of the Act, 29 U.S.C. 1109, to redress a fiduciary breach, and subsection (a)(5) authorizes the Secretary to bring a civil action for appropriate equitable relief to redress a violation of Title I. Because subsection (a)(2) affords the Secretary a fully adequate means of obtaining redress against a fiduciary, the reference to subsection (a)(5) plainly contemplates that the Secretary will invoke that subsection to obtain redress against the "other person[s]" mentioned in Section 502(*l*)—in this case, parties in interest that are not fiduciaries.



Indeed, there can be no doubt that, when it enacted Section 502(*l*) in 1989, Congress intended that the persons "other" than fiduciaries from whom the Secretary may obtain appropriate equitable relief under Section 502(a)(5) include nonfiduciary parties in interest who violate the prohibited-transaction rules in Section 406. That is so because the final sentence of Section 502(*l*) specifies that "[t]he penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26." 29 U.S.C. 1132(*l*)(4). As explained above, the penalty imposed under subsection (i) of Section 502 and the tax assessed under Section 4975 apply to nonfiduciary parties in interest that engage in prohibited transactions. Thus, nonfiduciary parties in interest are necessarily included among the "other person[s]" referred to in the final sentence of Section 502(*l*).[8] The reduction of the Section 502(*l*) penalty

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[8] In *Mertens*, the Court suggested that the reference in Section 502(*l*) to "any other person" who knowingly participates in a fiduciary breach might be to a co-fiduciary, since Section 405(a) of the Act, 29 U.S.C. 1105(a), renders a co-fiduciary liable for breaches of fiduciary duty by

imposed on "any other person" who engaged in a prohibited transaction—a penalty that is based on a percentage of the amount recovered in a civil action by the Secretary under Section 502(a)(5)—makes sense only if the "other person" who engaged in the prohibited transaction (*i.e.*, the party in interest) is subject to suit by the Secretary under Section 502(a)(5) to obtain appropriate equitable relief to redress the prohibited transaction.

Because a participant, beneficiary, or fiduciary may bring the same type of actions under Section 502(a)(3) that the Secretary may bring under Section 502(a)(5), see *Varity Corp.* v. *Howe*, 516 U.S. 489, 510 (1996),[9] it follows that Section 502(a)(3) likewise authorizes a civil action against a nonfiduciary party in interest to obtain appropriate equitable relief to redress a prohibited transaction. See *Mertens*, 508 U.S. at 260.

c. ERISA's civil penalty provisions applicable to prohibited transactions make it clear that obtaining restitution to a plan from a nonfiduciary party in interest to redress a prohibited transaction is the primary focus of those statutory

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another fiduciary in certain circumstances. See 508 U.S. at 260-261. But co-fiduciaries are fiduciaries. The only reading of the references in Section 502(*l*) to "fiduciary or other person" that gives meaning to all of its words is one in which "other person" means a person who is *not* a fiduciary—including a person, such as respondent Salomon, who is a nonfiduciary party in interest. The term "person" is specifically defined in ERISA to mean "an individual, partnership, joint venture, corporation, mutual company, joint-stock company, trust, estate, unincorporated organization, association, or employee organization." 29 U.S.C. 1002(9). That definition is not limited to "fiduciary," a term that is separately defined in 29 U.S.C. 1002(21). The discussion of "other person" in *Mertens* did not advert to the separate definition of "person."

[9] The only difference between Subsections (a)(3) and (a)(5) is that the former includes actions to redress violations of, or to enforce, terms of a plan as well as the Act; under the latter, the Secretary is limited to bringing actions to redress violations of, or to enforce, the Act itself.



enforcement mechanisms, and that such redress takes priority over assessing against the party in interest a civil penalty or tax to be paid into the United States Treasury. First, before sending a notice of tax deficiency, the Secretary of the Treasury must notify the Secretary of Labor and provide her a reasonable opportunity to obtain a correction of the transaction or comment on the proposed tax assessment. 26 U.S.C. 4975(h); 29 U.S.C. 1203(a). Moreover, as noted above (at p. 17), the civil penalty or tax imposed under Section 502(i) of ERISA or 26 U.S.C. 4795 increases to 100% of the amount of the transaction *only* if the party in interest does not correct the transaction—*i.e.*, undo the transaction to the extent possible or otherwise restore the plan's financial position—within a specified period. Finally, the civil penalty under Section 502(*l*) may be waived or reduced by the Secretary if the fiduciary or other person otherwise "will not be able to restore all losses to the plan * * * without severe financial hardship." 29 U.S.C. 1132(*l*)(3)(B); see also 29 U.S.C. 1203(a) (authorizing Secretary of Treasury to waive tax imposed by Section 4975 in appropriate cases).

That preference for redress to the plan over imposition of civil penalties or fines is consistent with the central purpose of ERISA to safeguard and ensure the financial soundness of employee benefit plans. 29 U.S.C. 1001(a). By contrast, to limit civil actions under Sections 502(a)(3) and 502(a)(5) in a manner that precludes suits for restitution of plan assets from nonfiduciary parties in interest would contradict that statutory preference. It also would contradict ERISA's stated intent to provide for "ready access to the Federal courts." 29 U.S.C. 1001(b). See also *Varity Corp.*, 516 U.S. at 512 (characterizing Section 502(a)(3) as a "safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy").

### C. Background Principles Of Trust Law And Equity And The Purposes Of ERISA

1. The court of appeals' holding that an action will not lie against a nonfiduciary party in interest under Section 502(a)(3) for restitution or disgorgement of assets and profits obtained in a prohibited transaction is inconsistent with established common law trust principles to which this Court looks "to develop a 'federal common law of rights and obligations under ERISA-regulated plans.'" *Firestone Tire & Rubber Co.* v. *Bruch*, 489 U.S. 101, 110 (1989) (quoting *Pilot Life Ins. Co.* v. *Dedeaux*, 481 U.S. 41, 56 (1987)). Congress defined the cause of action under Section 502(a)(3) in traditional trust terms—a civil action for "appropriate equitable relief." 29 U.S.C. 1132(a)(3). Congress's choice of that terminology is naturally understood as referring to background principles of trust law and equity for further definition of the cause of action it created. See also S. Rep. No. 383, 93d Cong., 1st Sess. 105 (1973), *reprinted in* 1 *Legislative History of the Employee Retirement Income Security Act of 1974*, at 1173 (1976) (*Leg. Hist.*) (stating that appropriate relief would include the equitable remedy of a constructive trust). Cf. *Mertens*, 508 U.S. at 260 ("the 'equitable relief' awardable under § 502(a)(5) includes restitution of ill-gotten plan assets or profits").

Traditionally, appropriate equitable relief included restitution of trust assets, generally through imposition of a constructive trust, from third-parties to whom trust property was transferred in breach of the trust. See generally Restatement (Second) of Trusts §§ 288, 289, 290, at 55-57 (1959); George Bogert & George Bogert, *Trusts and Trustees* § 868, at 109-112 (1995); William Fratcher, *Scott on Trusts* § 291.1, at 77-78 (1989).[10] The ability to obtain

[10] Restitution is a core concept in equity, employed principally through the remedy of a constructive trust. Elaine Shoben & William Tabb, *Cases and Problems on Remedies* 711 (1989); Restatement of Restitution § 160, at 140, Introductory Note 9 (1937); John Dawson, *Unjust Enrichment* 26 (1951); *Stauffer* v. *Stauffer*, 351 A.2d 236, 241 (Pa. 1976) (constructive trust "is an equitable remedy designed to prevent unjust enrichment").



restitution from a transferee of trust property was not based on the nonfiduciary's *own* breach of a legal duty, contrary to the suggestion in *Mertens*, 508 U.S. at 255 n.5. A constructive trust to obtain restitution from a nonfiduciary was based on principles of unjust enrichment, not independent wrongdoing, Dan B. Dobbs, *Law of Remedies* § 4.3(2), at 397 (2d ed. 1993), and the cause of action was typically viewed as arising from the duties imposed by equity on the breaching trustee. See *Strauss* v. *United States Fidelity & Guar. Co.*, 63 F.2d 174, 178 (4th Cir.), cert. denied, 289 U.S. 747 (1933); *Safe Deposit & Trust Co.* v. *Cahn*, 62 A. 819, 822 (Md. 1906); see also, *e.g.*, George Bogert & George Bogert, *supra*, § 889, at 257. Section 502(a)(3) therefore should be construed, consistently with those principles of trust law and equity, to allow a civil action for restitution or disgorgement against a party in interest such as Salomon who is unjustly enriched by its unlawful receipt of plan assets or its improper profiting from a prohibited transaction with a plan.

2. The remedial purposes of Section 406—to bar categorically transactions that experience had shown were likely to injure or be unfair to the plan, *Keystone Consol. Indus.*, 508 U.S. at 160—would be substantially weakened if a cause of action did not lie against a party in interest in these circumstances. "Such an interpretation of [S]ection 502(a)(5) [and therefore of Section 502(a)(3)] * * * effectively create[s] a zone of immunity, protecting the illegitimate gains of parties in interest who have completed prohibited transactions that the Secretary could have enjoined while they were occurring." *Stangl*, 73 F.3d at 1031. For example, where a fiduciary accepts money from a party in interest in

exchange for a recommendation that the plan invest millions of dollars in a real estate development, the developer that offered the illegal incentive and that consequently received the millions of dollars in plan assets would be permitted to keep those plan assets under the court of appeals' interpretation (albeit subject to an excise tax or civil penalty that goes to the federal treasury rather than the plan). Nonfiduciary parties in interest would be allowed to remain unjustly enriched, and the plan would be unable to obtain full relief if the fiduciary that caused the transactions is judgment-proof or has limited resources. Furthermore, in cases where unique assets, such as real estate, have been transferred to a party in interest, a remedy against the fiduciary that caused the transfer would necessarily be inadequate.

### D. This Court's Decision In *Mertens*

The majority in *Mertens* expressed doubt that ERISA provides a cause of action against a nonfiduciary for knowing participation in a fiduciary breach. 508 U.S. at 253-254. The dissenting opinion had no such doubts, however, see *id.* at 265 n.1, and the Court did not resolve the question, *id.* at 254-255. We continue to believe that Sections 502(a)(3) and 502(a)(5) do provide such a cause of action.[11] That question, however, is not squarely presented in this case and, as in *Mertens*, the Court should not resolve it here.

Whether or not the *Mertens* majority's doubts on that issue were well founded, the majority did not suggest that it had doubts about whether Section 502(a)(3) authorizes an action against nonfiduciary parties in interest who violate the prohibited-transaction rules in Section 406. To the contrary, at a later point in the opinion, the Court stated that

[11] We sought certiorari on that issue after *Mertens* in *Reich* v. *Continental Casualty Co.*, No. 94-1094, but the Court denied the petition. 513 U.S. 1152 (1995).



persons who provide services to a plan "must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406, and pay related civil penalties, see § 502(i), 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subject to other equitable decrees." *Mertens*, 508 U.S. at 262. The Court thus distinguished between the requirement that service providers disgorge assets and profits obtained through participation as parties in interest in prohibited transactions, which the Court did not question, and potential liability for participation in a fiduciary's breach of its fiduciary duty, which the Court merely assumed for purposes of its decision.

Furthermore, the Court made those observations in the course of discussing how ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262. Even if the *Mertens* majority were correct in its suggestion that Sections 502(a)(3) and 502(a)(5) do not generally provide a cause of action against nonfiduciary third parties who participate in fiduciary breaches, there would be no justification for extending that conclusion to bar a suit against a party in interest that had full control over its role in the prohibited transaction with the plan. As shown by background principles of trust law and equity, as well as by the civil penalty and tax provisions of ERISA itself, a party in interest that receives plan assets through a prohibited transaction is properly subject to a civil action for restitution or other appropriate equitable relief to redress the transaction.[12]

[12] In *Lockheed Corp.*, 517 U.S. at 889 n.3, the Court noted that its discussion in *Mertens* of the liability of parties in interest to disgorge assets and profits obtained in violation of Section 406(a) was dicta. The

**E. The Legislative History Of ERISA**

The legislative history of ERISA supports an interpretation of Sections 502(a)(3) and 502(a)(5) that authorizes actions for restitution against nonfiduciary parties in interest who engage in prohibited transactions.

1. The Conference Report accompanying the final bill enacted as ERISA in 1974 specifically states that the prohibited-transaction provisions "prohibit[] plan fiduciaries and parties-in-interest from engaging in a number of specific transactions." H.R. Conf. Rep. No. 1280, 93d Cong., 2d Sess. 306 (1974), *reprinted in* 3 *Leg. Hist.* 4573. That clear statement confirms the common sense reading of the prohibited-transaction provision—that such transactions violate the Act and that both parties are prohibited from engaging in such transactions.

Moreover, the Conference Report indicates that the statutory language in Section 406(a) directed specifically at fiduciaries was not intended to render fiduciaries the only persons liable for engaging in a prohibited transaction, as the court of appeals believed. See Pet. App. 7a-8a. Rather, the wording of Section 406(a)—"[a] fiduciary * * * shall not cause the plan to engage in a transaction, if he knows or should know" that the transaction constitutes one of the

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Court also noted that its discussion in *Mertens* in any event suggested such liability only when a violation of Section 406(a) is established, which, under *Lockheed*, "requires a showing that a fiduciary caused the plan to engage in the transaction in question." *Ibid.* The Court went on to say that, therefore, the lower court in *Lockheed* "was not necessarily wrong in saying that 'a party in interest who benefitted from an *impermissible* transaction can be held liable under ERISA.'" *Ibid.* (emphasis added by this Court). This case has proceeded on the assumption that a fiduciary (NISA) caused the plan to engage in the prohibited transaction, which establishes a violation of Section 406. See *Lockheed*, 517 U.S. at 888-889. Salomon, as a nonfiduciary party in interest, benefitted from that impermissible transaction. Accordingly, it should be liable for restitution to the plan.



listed prohibited transactions—was intended to impose a knowledge requirement before a fiduciary could be held personally liable, including for damages. The Report explains that that language reflects one of the distinctions between the prohibited-transaction provisions and exemptions in Title I of ERISA and the corresponding provisions in the IRC: "Under the labor provisions, a fiduciary will be liable only if he knew or should have known that he engaged in a prohibited transaction. Such a knowledge requirement is not included in the tax provisions. This distinction conforms to the distinction in present law in the private foundation provisions (where a foundation's manager generally is subject to a tax on self-dealing if he acted with knowledge, but a disqualified person is subject to tax without proof of knowledge)." H.R. Conf. Rep. No. 1280, *supra*, at 306-307, *reprinted in* 3 *Leg. Hist.* 4573-4574. Thus, the Conference Report is consistent with parties in interest (and disqualified persons) being liable without such knowledge, but only for equitable relief (*e.g.*, an injunction or disgorgement) under Section 502(a)(3) and (5) and for a civil penalty under Section 502(i) or a tax under 26 U.S.C. 4975.[13]

The court of appeals focused not on the Conference Report, but on the fact that the version of the bill that passed the Senate included a provision that would have expressly

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[13] The Conference Report further explains, however, that, "[i]n general, it is expected that a transaction will not be a prohibited transaction (under either the labor or the tax provisions) if the transaction is an ordinary 'blind' purchase or sale of securities through an exchange where neither buyer nor seller (nor the agent of either) knows the identity of the other party involved. In this case, there is no reason to impose a sanction on a fiduciary (or party-in-interest) merely because, by chance, the other party turns out to be a party-in-interest (or plan)." H.R. Conf. Rep. No. 1280, *supra*, at 307, *reprinted in* 3 *Leg. Hist.* 4574. Again, the Report could not be clearer in its view that parties in interest are prohibited from engaging in particular transactions with a plan and can be sanctioned for their violation of that prohibition.

imposed personal liability, including for damages, on any party in interest who knowingly participated in a transaction prohibited by the Act. See Pet. App. 12a (quoting H.R. 2, 93d Cong., 2d Sess. § 511, at 538-574) (with amendments as passed by the Senate), *reprinted in* 3 *Leg. Hist.* at 3780. The court of appeals inferred from the omission of that provision in the final bill that Congress did not intend to subject nonfiduciary parties in interest to a civil action for restitution or other appropriate equitable relief. Pet. App. 12a. The court failed to recognize, however, that at the same time the Conference Committee declined to adopt the specific provision in the Senate bill subjecting a party in interest to liability, it broadened the general civil enforcement section, beyond the provision in the House bill that allowed suits to enjoin any act or practice that violates Title I (H.R. 2, 93d Cong., 2d Sess., § 503(e)(3), at 150, *reprinted in* 3 *Leg. Hist.* at 4047), to include as well the provision in Sections 502(a)(3) and 502(a)(5) for other "appropriate equitable relief" to "redress" such a violation. See H.R. Conf. Rep. No. 1280, *supra*, at 327, *reprinted in* 3 *Leg. Hist.* at 4594 (conferees expanded Section 502 to allow the Secretary to bring "an action for breach of a fiduciary duty or to enjoin any act or practice which violates * * * title I of the Act or to obtain any other appropriate relief to enforce any provision of that title"). In light of that broad language ultimately chosen by Congress, an interpretation of Section 502(a)(3) that allows actions against nonfiduciary parties in interest for restitution or other appropriate equitable relief is fully consistent with the legislative record. See *Stangl*, 73 F.3d at 1033-1034.

2. That conclusion is reinforced by Congress's enactment in 1989 of Section 502(*l*) which, as discussed above (at pp. 18-20), authorizes a civil penalty against parties in interest who engage in prohibited transactions in circumstances where the Secretary has obtained a recovery in a settlement or a civil action brought by the Secretary under Section 502(a)(5).



The text of Section 502(*l*) presupposes that the Secretary has authority to bring a civil action against a nonfiduciary party in interest who engages in a prohibited transaction.

The legislative history of the 1989 amendment shows that Congress declined to enact a separate provision in the House bill that was intended to clarify that a third party generally could be liable for knowing participation in a fiduciary breach. H.R. Rep. No. 247, 101st Cong., 2d Sess. 77 (1989). There was no suggestion, however, that any clarification was necessary regarding the availability of civil actions against nonfiduciary parties in interest that participate in prohibited transactions, which had been recognized by the courts. To the contrary, the Report noted that the Committee proposed the amendment because a divided panel of the Ninth Circuit had recently held in *Nieto* v. *Ecker*, 845 F.2d 868 (1988), that a court could not order a remedy against a nonfiduciary, "except to the extent that the non-fiduciary engaged in a transaction specifically prohibited by section 406 of ERISA as a party in interest." H.R. Rep. No. 247, *supra*, at 77. See *Nieto*, 845 F.2d at 873-874 (holding that plaintiffs stated a cause of action under Section 502(a)(3) against a nonfiduciary party in interest that engaged in a prohibited transaction).

Moreover, the Conference Report accompanying the enactment of Section 502(*l*) reinforced ERISA's emphasis on restoring the financial strength of the plan. The Report stated that "the conferees expect that in all circumstances the Department of Labor will take all necessary actions to restore assets lost to the plan as a result of a fiduciary breach." H.R. Conf. Rep. No. 386, 101 Cong., 2d Sess. 432 (1989). The Report also emphasized ERISA's policy of encouraging enforcement by both the Secretary and private parties through both administrative and judicial measures:

> The conferees believe strengthened civil penalties will better enable the Department to protect participants and beneficiaries. The conferees further believe that the

> need for strengthened enforcement and deterrence of violations of ERISA applies not only to the Department of Labor, but to judicial oversight of private rights of action affecting employee benefit plans. It remains the intent of Congress that the courts use their power [to] fashion legal and equitable remedies that not only protect participants and beneficiaries but deter violations of the law as well. The conferees expect that the executive agencies and the courts will use their substantial authority to achieve these goals and to safeguard the rights of plan participants.

*Id.* at 432-433. The enactment of Section 502(*l*) in 1989 therefore once again confirmed that a judicial order requiring a party in interest to make restitution to the plan of assets or profits it realized through a prohibited transaction with the plan constitutes "appropriate equitable relief" to redress such a violation of ERISA.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 2000

## APPENDIX

1. Section 502 of Employee Retirement Income Security Act of 1974, 29 U.S.C. 1132 (1994 & Supp. III 1997), provides, in relevant part:

**Civil enforcement**

**(a) Persons empowered to bring a civil action**

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter;

(6) by the Secretary to collect any civil penalty under paragraph (2), (4), (5), or (6) of subsection (c) of this section or under subsection (i) or (l) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title);

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection; or

(9) in the event that the purchase of an insurance contract or insurance annuity in connection with termination of an individual's status as a participant covered under a pension plan with respect to all or any portion of the participant's pension benefit under such plan constitutes a violation of part 4 of this title[1] or the terms of the plan, by the Secretary, by any individual who was a

[1] So in original. Probably should be "subtitle".



participant or beneficiary at the time of the alleged violation, or by a fiduciary, to obtain appropriate relief, including the posting of security if necessary, to assure receipt by the participant or beneficiary of the amounts provided or to be provided by such insurance contract or annuity, plus reasonable prejudgment interest on such amounts.

* * * * *

**(i) Administrative assessment of civil penalty**

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved in each such transaction (as defined in section 4975(f)(4) of title 26) for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected (in such manner as the Secretary shall prescribe in regulations which shall be consistent with section 4975(f)(5) of title 26) within 90 days after notice from the Secretary (or such longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of title 26.

* * * * *

**(l) Civil penalties on violations by fiduciaries**

(1) In the case of—

(A) any breach of fiduciary responsibility under (or other violation of) part 4 of this subtitle by a fiduciary, or

(B) any knowing participation in such a breach or violation by any other person,

the Secretary shall assess a civil penalty against such fiduciary or other person in an amount equal to 20 percent of the applicable recovery amount.

(2) For purposes of paragraph (1), the term "applicable recovery amount" means any amount which is recovered from a fiduciary or other person with respect to a breach or violation described in paragraph (1)—

(A) pursuant to any settlement agreement with the Secretary, or

(B) ordered by a court to be paid by such fiduciary or other person to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of this section.

(3) The Secretary may, in the Secretary's sole discretion, waive or reduce the penalty under paragraph (1) if the Secretary determines in writing that—

(A) the fiduciary or other person acted reasonably and in good faith, or



(B) it is reasonable to expect that the fiduciary or other person will not be able to restore all losses to the plan (or to provide the relief ordered pursuant to subsection (a)(9) of this section) without severe financial hardship unless such waiver or reduction is granted.

(4) The penalty imposed on a fiduciary or other person under this subsection with respect to any transaction shall be reduced by the amount of any penalty or tax imposed on such fiduciary or other person with respect to such transaction under subsection (i) of this section and section 4975 of title 26.

2. Section 3003 of ERISA, 29 U.S.C. 1203, provides:

**Procedures in connection with prohibited transactions**

**(a) Notification to Secretary of Labor; opportunity to comment on imposition of tax under Section 4975 of title 26; waiver; requests for invertigations**

Unless the Secretary of the Treasury finds that the collection of a tax is in jeopardy, in carrying out the provisions of section 4975 of title 26 (relating to tax on prohibited transactions) the Secretary of the Treasury shall, in accordance with the provisions of subsection (h) of such section, notify the Secretary of Labor before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b) of such section, and, in accordance with the provisions of subsection (h) of such section, afford the Secretary an opportunity to comment on the imposition of the tax in any case. The Secretary of the Treasury shall have authority to waive the imposition of the tax imposed under section 4975(b) in appropriate cases. Upon receiving a written request from the Secretary of Labor or from the

Pension Benefit Guaranty Corporation, the Secretary of the Treasury shall cause an investigation to be carried out with respect to whether the tax imposed by section 4975 of title 26 should be applied to any person referred to in the request.

**(b) Consultation**

The Secretary of the Treasury and the Secretary of Labor shall consult with each other from time to time with respect to the provisions of section 4975 of title 26 (relating to tax on prohibited transactions) and with respect to the provisions of subchapter I of this chapter relating to prohibited transactions and exemptions therefrom in order to coordinate the rules applicable under such standards.

**(c) Transmission of information to Secretary of the Treasury**

Whenever the Secretary of Labor obtains information indicating that a party-in-interest or disqualified person is violating section 1106 of this title, he shall transmit such information to the Secretary of the Treasury.



3. Section 4975 of Title 26 of the United States Code (1994 & Supp. III 1997) provides:

**Tax on prohibited transactions**

**(a) Initial taxes on disqualified person.**

There is hereby imposed a tax on each prohibited transaction. The rate of tax shall be equal to 15 percent of the amount involved with respect to the prohibited transaction for each year (or part thereof) in the taxable period. The tax imposed by this subsection shall be paid by any disqualified person who participates in the prohibited transaction (other than a fiduciary acting only as such).

**(b) Additional taxes on disqualified person.**

In any case in which an initial tax is imposed by subsection (a) on a prohibited transaction and the transaction is not corrected within the taxable period, there is hereby imposed a tax equal to 100 percent of the amount involved. The tax imposed by this subsection shall be paid by any disqualified person who participated in the prohibited transaction (other than a fiduciary acting only as such).

**(c) Prohibited transaction.**

**(1) General rule.**

For purposes of this section, the term "prohibited transaction" means any direct or indirect—

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interest or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.

**(2) Special exemption.**

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any disqualified person or transaction, orders of disqualified persons or transactions, from all or part of the restrictions imposed by paragraph (1) of this subsection. Action under this subparagraph may be taken only after consultation and coordination with the Secretary of Labor. The Secretary may not grant an exemption under this paragraph unless he finds that such exemption is—

(A) administratively feasible,



(B) in the interests of the plan and of its participants and beneficiaries, and

(C) protective of the rights of participants and beneficiaries of the plan.

Before granting an exemption under this paragraph, the Secretary shall require adequate notice to be given to interested persons and shall publish notice in the Federal Register of the pendency of such exemption and shall afford interested persons an opportunity to present views. No exemption may be granted under this paragraph with respect to a transaction described in subparagraph (E) or (F) of paragraph (1) unless the Secretary affords an opportunity for a hearing and makes a determination on the record with respect to the findings required under subparagraphs (A), (B), and (C) of this paragraph, except that in lieu of such hearing the Secretary may accept any record made by the Secretary of Labor with respect to an application for exemption under section 408(a) of title I of the Employee Retirement Income Security Act of 1974.

**(3) Special rule for individual retirement accounts.**

An individual for whose benefit an individual retirement account is established and his beneficiaries shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if, with respect to such transaction, the account ceases to be an individual retirement account by reason of the application of section 408(e)(2)(A) or if section 408(e)(4) applies to such account.

**(4) Special rule for medical savings accounts.**

An individual for whose benefit a medical savings account (within the meaning of section 220(d)) is established shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 220(e)(2) applies to such transaction.

**(5) Special rule for education individual retirement accounts.**

An individual for whose benefit an education individual retirement account is established and any contributor to such account shall be exempt from the tax imposed by this section with respect to any transaction concerning such account (which would otherwise be taxable under this section) if section 530(d) applies with respect to such transaction.

**(d) Exemptions.**

Except as provided in subsection (f)(6), the prohibitions provided in subsection (c) shall not apply to—

(1) any loan made by the plan to a disqualified person who is a participant or beneficiary of the plan if such loan—

(A) is available to all such participants or beneficiaries on a reasonably equivalent basis,

(B) is not made available to highly compensated employees (within the meaning of section



414(q)) in an amount greater than the amount made available to other employees,

(C) is made in accordance with specific provisions regarding such loans set forth in the plan,

(D) bears a reasonable rate of interest, and

(E) is adequately secured;

(2) any contract, or reasonable arrangement, made with a disqualified person for office space, or legal, accounting, or other services necessary for the establishment or operation of the plan, if no more than reasonable compensation is paid therefor;

(3) any loan to an[2] leveraged employee stock ownership plan (as defined in subsection (e)(7)), if—

(A) such loan is primarily for the benefit of participants and beneficiaries of the plan, and

(B) such loan is at a reasonable rate of interest, and any collateral which is given to a disqualified person by the plan consists only of qualifying employer securities (as defined in subsection (e)(8));

(4) the investment of all or part of a plan's assets in deposits which bear a reasonable interest rate in a bank or similar financial institution supervised by the United States or a State, if such bank or other institution is a fiduciary of such plan and if—

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[2] So in original. Probably should be "a".

(A) the plan covers only employees of such bank or other institution and employees of affiliates of such bank or other institution, or

(B) such investment is expressly authorized by a provision of the plan or by a fiduciary (other than such bank or institution or affiliates thereof) who is expressly empowered by the plan to so instruct the trustee with respect to such investment;

(5) any contract for life insurance, health insurance, or annuities with one or more insurers which are qualified to do business in a State if the plan pays no more than adequate consideration, and if each such insurer or insurers is—

(A) the employer maintaining the plan, or

(B) a disqualified person which is wholly owned (directly or indirectly) by the employer establishing the plan, or by any person which is a disqualified person with respect to the plan, but only if the total premiums and annuity considerations written by such insurers for life insurance, health insurance, or annuities for all plans (and their employers) with respect to which such insurers are disqualified persons (not including premiums or annuity considerations written by the employer maintaining the plan) do not exceed 5 percent of the total premiums and annuity considerations written for all lines of insurance in that year by such insurers (not including premiums or



annuity considerations written by the employer maintaining the plan);

(6) the provision of any ancillary service by a bank or similar financial institution supervised by the United States or a State, if such service is provided at not more than reasonable compensation, if such bank or other institution is a fiduciary of such plan, and if—

(A) such bank or similar financial institution has adopted adequate internal safeguards which assure that the provision of such ancillary service is consistent with sound banking and financial practice, as determined by Federal or State supervisory authority, and

(B) the extent to which such ancillary service is provided is subject to specific guidelines issued by such bank or similar financial institution (as determined by the Secretary after consultation with Federal and State supervisory authority), and under such guidelines the bank or similar financial institution does not provide such ancillary service—

(i) in an excessive or unreasonable manner, and

(ii) in a manner that would be inconsistent with the best interests of participants and beneficiaries of employee benefit plans;

(7) the exercise of a privilege to convert securities, to the extent provided in regulations of the

Secretary, but only if the plan receives no less than adequate consideration pursuant to such conversion;

(8) any transaction between a plan and a common or collective trust fund or pooled investment fund maintained by a disqualified person which is a bank or trust company supervised by a State or Federal agency or between a plan and a pooled investment fund of an insurance company qualified to do business in a State if—

(A) the transaction is a sale or purchase of an interest in the fund,

(B) the bank, trust company, or insurance company receives not more than reasonable compensation, and

(C) such transaction is expressly permitted by the instrument under which the plan is maintained, or by a fiduciary (other than the bank, trust company, or insurance company, or an affiliate thereof) who has authority to manage and control the assets of the plan;

(9) receipt by a disqualified person of any benefit to which he may be entitled as a participant or beneficiary in the plan, so long as the benefit is computed and paid on a basis which is consistent with the terms of the plan as applied to all other participants and beneficiaries;

(10) receipt by a disqualified person of any reasonable compensation for services rendered, or for the reimbursement of expenses properly and actually incurred, in the performance of his duties with the plan,



but no person so serving who already receives full-time pay from an employer or an association of employers, whose employees are participants in the plan or from an employee organization whose members are participants in such plan shall receive compensation from such fund, except for reimbursement of expenses properly and actually incurred;

(11) service by a disqualified person as a fiduciary in addition to being an officer, employee, agent, or other representative of a disqualified person;

(12) the making by a fiduciary of a distribution of the assets of the trust in accordance with the terms of the plan if such assets are distributed in the same manner as provided under section 4044 of title IV of the Employee Retirement Income Security Act of 1974 (relating to allocation of assets);

(13) any transaction which is exempt from section 406 of such Act by reason of section 408(e) of such Act (or which would be so exempt if such section 406 applied to such transaction) or which is exempt from section 406 of such Act by reason of section 408(b)(12) of such Act;

(14) any transaction required or permitted under part 1 of subtitle E of title IV or section 4223 of the Employee Retirement Income Security Act of 1974, but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F); or

(15) a merger of multiemployer plans, or the transfer of assets or liabilities between multiemployer plans, determined by the Pension Benefit Guaranty

Corporation to meet the requirements of section 4231 of such Act, but this paragraph shall not apply with respect to the application of subsection (c)(1)(E) or (F).

**(e) Definitions.**

**(1) Plan.**

For purposes of this section, the term "plan" means—

(A) a trust described in section 401(a) which forms a part of a plan, or a plan described in section 403(a), which trust or plan is exempt from tax under section 501(a),

(B) an individual retirement account described in section 408(a),

(C) an individual retirement annuity described in section 408(b),

(D) a medical savings account described in section 220(d),

(E) an education individual retirement account described in section 530, or

(F) a trust, plan, account, or annuity which, at any time, has been determined by the Secretary to be described in any preceding subparagraph of this paragraph.



**(2) Disqualified person.**

For purposes of this section, the term "disqualified person" means a person who is—

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise,

which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6)) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate,

is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

The Secretary, after consultation and coordination with the Secretary of Labor or his delegate, may by regulation prescribe a percentage lower than 50 percent for



subparagraphs (E) and (G) and lower than 10 percent for subparagraphs (H) and (I).

**(3) Fiduciary.**

For purposes of this section, the term "fiduciary" means any person who—

(A) exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets,

(B) renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or

(C) has any discretionary authority or discretionary responsibility in the administration of such plan.

Such term includes any person designated under section 405(c)(1)(B) of the Employee Retirement Income Security Act of 1974.

**(4) Stockholdings.**

For purposes of paragraphs (2)(E)(i) and (G)(i) there shall be taken into account indirect stockholdings which would be taken into account under section 267(c), except that, for purposes of this paragraph, section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

**(5) Partnerships; trusts.**

For purposes of paragraphs (2)(E)(ii) and (iii), (G)(ii) and (iii), and (I) the ownership of profits or beneficial interests shall be determined in accordance with the rules for constructive ownership of stock provided in section 267(c) (other than paragraph (3) thereof), except that section 267(c)(4) shall be treated as providing that the members of the family of an individual are the members within the meaning of paragraph (6).

**(6) Member of family.**

For purposes of paragraph (2)(F), the family of any individual shall include his spouse, ancestor, lineal descendant, and any spouse of a lineal descendant.

**(7) Employee stock ownership plan.**

The term "employee stock ownership plan" means a defined contribution plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus and a money purchase plan both of which are qualified under section 401(a), and which are designed to invest primarily in qualifying employer securities; and

(B) which is otherwise defined in regulations prescribed by the Secretary.

A plan shall not be treated as an employee stock ownership plan unless it meets the requirements of section 409(h), section 409(o), and, as applicable, section 409(n) and section 664(g) and, if the employer has a registration-type class of



securities (as defined in section 409(e)(4)), it meets the requirements of section 409(e).

**(8) Qualifying employer security.**

The term "qualifying employer security" means any employer security within the meaning of section 409(l). If any moneys or other property of a plan are invested in shares of an investment company registered under the Investment Company Act of 1940, the investment shall not cause that investment company or that investment company's investment adviser or principal underwriter to be treated as a fiduciary or a disqualified person for purposes of this section, except when an investment company or its investment adviser or principal underwriter acts in connection with a plan covering employees of the investment company, its investment adviser, or its principal underwriter.

**(9) Section made applicable to withdrawal liability payment funds.**

For purposes of this section—

**(A) In general.**

The term "plan" includes a trust described in section 501(c)(22).

**(B) Disqualified person.**

In the case of any trust to which this section applies by reason of subparagraph (A), the term "disqualified person" includes any person who is a disqualified person with respect to any plan to which such trust is permitted

to make payments under section 4223 of the Employee Retirement Income Security Act of 1974.

**(f) Other definitions and special rules.**

For purposes of this section—

**(1) Joint and several liability.**

If more than one person is liable under subsection (a) or (b) with respect to any one prohibited transaction, all such persons shall be jointly and severally liable under such subsection with respect to such transaction.



**(2) Taxable period.**

The term "taxable period" means, with respect to any prohibited transaction, the period beginning with the date on which the prohibited transaction occurs and ending on the earliest of—

(A) the date of mailing a notice of deficiency with respect to the tax imposed by subsection (a) under section 6212,

(B) the date on which the tax imposed by subsection (a) is assessed, or

(C) the date on which correction of the prohibited transaction is completed.

**(3) Sale or exchange; encumbered property.**

A transfer of real or personal property by a disqualified person to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a disqualified person placed on the property within the 10-year period ending on the date of the transfer.

**(4) Amount involved.**

The term "amount involved" means, with respect to a prohibited transaction, the greater of the amount of money and the fair market value of the other property given or the amount of money and the fair market value of the other property received; except that, in the case of services described in paragraphs (2) and (10) of subsection (d) the amount involved shall be only the excess compensation. For purposes of the preceding sentence, the fair market value—

(A) in the case of the tax imposed by subsection (a), shall be determined as of the date on which the prohibited transaction occurs; and

(B) in the case of the tax imposed by subsection (b), shall be the highest fair market value during the taxable period.

**(5) Correction.**

The terms "correction" and "correct" mean, with respect to a prohibited transaction, undoing the transaction to the extent possible, but in any case placing the plan in a financial position not worse than that in which it would be if the disqualified person were acting under the highest fiduciary standards.

**(6) Exemptions not to apply to certain transactions.**

**(A) In general.**

In the case of a trust described in section 401(a) which is part of a plan providing contributions or benefits for employees some or all of whom are owner-employees (as defined in section 401(c)(3)), the exemptions provided by subsection (d) (other than paragraphs (9) and (12)) shall not apply to a transaction in which the plan directly or indirectly—

(i) lends any part of the corpus or income of the plan to,



(ii) pays any compensation for personal services rendered to the plan to, or

(iii) acquires for the plan any property from, or sells any property to,

any such owner-employee, a member of the family (as defined in section 267(c)(4)) of any such owner-employee, or any corporation in which any such owner-employee owns, directly or indirectly, 50 percent or more of the total combined voting power of all classes of stock entitled to vote or 50 percent or more of the total value of shares of all classes of stock of the corporation.

**(B) Special rules for shareholder-employees, etc.**

**(i) In general.**

For purposes of subparagraph (A), the following shall be treated as owner-employees:

(I) A shareholder-employee.

(II) A participant or beneficiary of an individual retirement plan (as defined in section 7701(a)(37)).

(III) An employer or association of employees which establishes such an individual retirement plan under section 408(c).

**(ii) Exception for certain transactions involving shareholder-employees.**

Subparagraph (A)(iii) shall not apply to a transaction which consists of a sale of employer

securities to an employee stock ownership plan (as defined in subsection (e)(7)) by a shareholder-employee, a member of the family (as defined in section 267(c)(4)) of such shareholder-employee, or a corporation in which such a shareholder-employee owns stock representing a 50 percent or greater interest described in subparagraph (A).

**(C) Shareholder-employee.**

For purposes of subparagraph (B), the term "shareholder-employee" means an employee or officer of an S corporation who owns (or is considered as owning within the meaning of section 318(a)(1)) more than 5 percent of the outstanding stock of the corporation on any day during the taxable year of such corporation.

**(g) Application of section.**

This section shall not apply—

(1) in the case of a plan to which a guaranteed benefit policy (as defined in section 401(b)(2)(B) of the Employee Retirement Income Security Act of 1974) is issued, to any assets of the insurance company, insurance service, or insurance organization merely because of its issuance of such policy;

(2) to a governmental plan (within the meaning of section 414(d)); or



(3) to a church plan (within the meaning of section 414(e)) with respect to which the election provided by section 410(d) has not been made.

In the case of a plan which invests in any security issued by an investment company registered under the Investment Company Act of 1940, the assets of such plan shall be deemed to include such security but shall not, by reason of such investment, be deemed to include any assets of such company.

**(h) Notification of Secretary of Labor.**

Before sending a notice of deficiency with respect to the tax imposed by subsection (a) or (b), the Secretary shall notify the Secretary of Labor and provide him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax.

**(i) Cross reference.**

For provisions concerning coordination procedures between Secretary of Labor and Secretary of the Treasury with respect to application of tax imposed by this section and for authority to waive imposition of the tax imposed by subsection (b), see section 3003 of the Employee Retirement Income Security Act of 1974.

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(8)

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No. 99-579

IN THE
SUPREME COURT OF THE UNITED STATES

**HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,**
*Petitioners,*

v.

**SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,**
*Respondents.*

**On Writ of Certiorari To The United States Court of Appeals For the Seventh Circuit**

# BRIEF *AMICUS CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

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No. 99-579

# In The Supreme Court of the United States

**HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,**
***Petitioners,***

**v.**

**SALOMON BROTHERS INC. and SALOMON BROTHERS REALTY CORP.,**
***Respondents.***

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT**

## BRIEF *AMICUS CURIAE* OF AARP AND NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONERS

## INTERESTS OF *AMICI CURIAE* [1]

AARP is a nonprofit membership organization of more than 33 million Americans age 50 or older, dedicated to addressing the needs and interests of older people. Approximately one-third of AARP's members are working, and receive employer-funded health, pension, disability, and other employee benefits.

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[1] No counsel for any party authored any portion of this brief. No persons other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation and submission of this brief.

Through education, advocacy, and service, and by promoting independence, dignity, and purpose, AARP seeks to enhance the quality of life for all citizens. In its efforts to promote independence, AARP works to foster the economic security of individuals as they age by attempting to ensure the availability, security, equity and adequacy of private pension, health, disability, and other employee benefits.

It is vitally important to AARP members to ensure that statutorily prohibited transactions may be remedied through lawsuits against all parties to the transactions. AARP members and other older Americans have a significant interest in ensuring that plan assets will be available to pay the benefits to which they are entitled and are used exclusively for the benefit of participants and beneficiaries. ERISA § 404(a)(1)(A), 29 U.S.C. § 1104(a)(1)(A); *cf. Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 140-43 & n.8 (1985) (ERISA was passed to prevent the misuse and mismanagement of plan assets). As of the second quarter of 1999, employer-sponsored private pension plans alone had over $4.6 trillion in assets, the single largest pool of capital in the United States. U.S. FEDERAL RESERVE BOARD, FLOW OF FUNDS ACCOUNTS OF THE UNITED STATES, SECOND QUARTER 1999 (Washington, DC: Board of Governors of the Federal Reserve System, 1999), Table L119. Such substantial assets lend themselves to potential misuse and mismanagement.

The National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 3,000 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional membership organization comprised of lawyers who primarily represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation affecting the rights of individuals in the workplace. It is of crucial importance to those individuals that all assets of the employee benefit plans in which they participate be available to pay benefits.



AARP and NELA thus advocate on behalf of individuals throughout the country to protect the rights of participants in private, employer-sponsored employee benefit plans covered by ERISA, 29 U.S.C. § 1001 *et seq.* For instance, AARP and NELA have filed numerous briefs *amicus curiae*, both jointly and singly, on various types of ERISA cases. *See, e.g., UNUM v. Ward*, 526 U.S. 358 (1999) (preemption); *Geissal v. Moore Medical Corp.*, 524 U.S. 74 (1998) (COBRA rights); *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997) (application of ERISA § 510 to welfare plans); *Lockheed Corp. v. Spink*, 517 U.S. 882 (1996) (definition of fiduciary); *Varity Corp. v. Howe*, 516 U.S. 489 (1996) (participant rights under ERISA § 502(a)(3)); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993) (ERISA remedies).

The decision in this case will have a direct and vital bearing on the economic security of older working Americans. In light of the significance of the issues presented by this case, *amici curiae* respectfully submit this brief.[2/]

## SUMMARY OF ARGUMENT

AARP and NELA address the only issue before the Court–whether there is a cause of action under § 502(a)(3) for equitable relief against a nonfiduciary party in interest which engages in a prohibited transaction.[3/] *Amici* believe that the Court should answer this question in the affirmative.

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[2/] The written consents of the parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

[3/] The Seventh Circuit only decided one issue – whether § 502(a)(3) permits a cause of action against a nonfiduciary party in interest. The Seventh Circuit did not address the issue of whether the relief sought by Petitioners was "appropriate equitable relief." Consequently, the Court should not review this issue. *See United States v. Williams*, 504 U.S. 36, 42 (1992) (the Court "will not review a question not pressed or passed upon by the courts below").

When interpreting ERISA's civil enforcement provisions under § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which the civil enforcement provisions were crafted, the structure of the statute, and the policies underlying ERISA. The Court has previously concluded that the precise language of the statute must be followed. *See Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). The Court has been unwilling to read into ERISA implied claims or remedies, and it has been similarly unwilling to read limiting language into the statute. *Id.* This case should be treated no differently. Accordingly, the Court should hold that § 502(a)(3) authorizes a cause of action for equitable relief against a nonfiduciary party in interest with which a plan has engaged in a prohibited transaction.

## ARGUMENT

### I. PRIOR SUPREME COURT PRECEDENT, THE RELEVANT TEXT OF ERISA § 502(a)(3), THE STRUCTURE OF ERISA'S ENTIRE ENFORCEMENT SCHEME, AND THE PURPOSES OF THE ACT ALL SUPPORT THE CONCLUSION THAT ERISA § 502(a)(3) AUTHORIZES A CAUSE OF ACTION FOR EQUITABLE RELIEF AGAINST A NONFIDUCIARY PARTY IN INTEREST WHICH ENGAGES IN A PROHIBITED TRANSACTION.

The issue before the Court is whether ERISA § 502(a)(3) permits a cause of action for equitable relief against a nonfiduciary party in interest which engages in a prohibited transaction.

#### A. The Court Has Strictly Interpreted ERISA's Civil Enforcement Provisions, Refusing to Infer Remedies and Causes of Action or to Read in Limitations Not Contained in the Wording of ERISA § 502(a).

This is not the first time that the Court will determine the scope of ERISA's civil enforcement provisions under § 502(a),



29 U.S.C. § 1132(a). *See Varity Corp. v. Howe*, 516 U.S. 489 (1996); *Mertens v. Hewitt Associates*, 508 U.S. 248 (1993); *Massachusetts Mutual Life Insurance Co. v. Russell*, 473 U.S. 134 (1985). In interpreting those provisions, the Court has proceeded from the premise that § 502 is a "carefully integrated civil enforcement scheme," which, in turn, is part of a "comprehensive and reticulated" statute. *Mertens*, 508 U.S. at 251; *Russell*, 473 U.S. at 146. As a result, the Court has refused to infer claims for relief and remedies which are not specifically enumerated in these civil enforcement provisions. Conversely, the Court has refused to read in limitations to these civil enforcement provisions where there are none stated in § 502(a).

In *Russell*, the Court held that a fiduciary could not be liable under § 409(a)[4/] to a participant or beneficiary for compensatory or punitive damages for a fiduciary breach. *Russell*, 473 U.S. at 148. *Russell* acknowledged that § 409 is specifically enforceable under, as well as expressly incorporated by reference into, § 502(a)(2). *Id.* at 140. The Court reasoned that, because the language of § 409 expressly authorizes only plan-based relief, the remedy for an action that is brought under § 502(a)(2) to enforce a violation of § 409(a) runs only to the

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[4/] ERISA § 409(a) states -

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this title shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 411 of this Act.

29 U.S.C. § 1109(a).

plan. Thus, it does not inure to the benefit of the individual participants or beneficiaries. *Id.* at 140, 144.

The Court next interpreted § 502(a) in *Mertens*. The issue in *Mertens* was whether a nonfiduciary who knowingly participated in a fiduciary breach was liable to the plan under § 502(a)(3) for losses resulting from such breach. *Mertens*, 508 U.S. at 251. The Court's analysis of that question focused on whether the phrase "appropriate equitable relief" in § 502(a)(3) encompassed compensatory or money damages. *Id.* at 255. In construing that phrase, the Court applied the established rule that a statute, if possible, be construed in such a fashion that every word has some operative effect so that no part will be rendered superfluous. *Id.* at 258 ("We will not read the statute to render the modifier superfluous.") (*citing United States v. Nordic Village, Inc.*, 503 U.S. 30, 36 (1992); *Moskal v. United States*, 498 U.S. 103, 109-10 (1990)). Under that rule, the Court concluded that "appropriate equitable relief" under § 502(a)(3) does not include compensatory or money damages because that interpretation would render the term "equitable" superfluous. *Id.* The Court reiterated the view that ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Id.* at 254 (*citing Russell*, 473 U.S. at 146-47; emphasis in original).

In *Varity*, the issue was whether § 502(a)(3) authorizes participants and beneficiaries to bring an action for individual relief based on a breach of fiduciary duty. 516 U.S. at 507. The Court stated that the words of § 502(a)(3) are extremely broad and would encompass such an action. *Id.* at 510. The Court rejected the argument that only § 409 covers liability for breaches of fiduciary duty. Indeed, the Court pointedly stated "that is not what the title or the provision says." *Id.* The Court again relied on the structure of ERISA's civil enforcement provisions. It contrasted the focus on a specific area in § 502(a)(2) with the absence of such a limitation in § 502(a)(3). *Id.* at 510-512. The Court refused to read such a limitation into § 502(a)(3).



Thus, when interpreting § 502(a), the Court repeatedly has looked at the plain language of ERISA, the "evident care" with which the civil enforcement provisions were crafted, and the structure of the statute, and concluded that the precise language of the statute must be followed. The Court has been unwilling to read into ERISA implied claims or remedies, and it has been similarly unwilling to read limiting language into the statute.

### B. The Plain Language of ERISA § 502(a)(3) Authorizes a Lawsuit for Equitable Relief Against a Nonfiduciary Party in Interest Which Has Engaged in a Prohibited Transaction.

Analysis of the plain language of ERISA's civil enforcement provisions inexorably leads to the conclusion that § 502(a)(3) authorizes an action to obtain relief from a nonfiduciary party in interest for a prohibited transaction.

Section 502(a)(3) authorizes a civil action -

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan.

29 U.S.C § 1132(a)(3).

Thus, § 502(a)(3) allows a participant, beneficiary, or fiduciary (as in this case) to bring a civil action for injunctive relief for a violation of "any provision" of Title I, and to obtain "appropriate equitable relief" to redress such a violation or to enforce "any provisions" of that Title. *Id.* Title I includes § 406, which sets out specific transactions between a fiduciary and a party in interest that Congress believed should always be prohibited because of the high incidence of misuse and

mismanagement of plan assets.[5] *See Commissioner of Internal Revenue v. Keystone Consolidated Industries*, 508 U.S. 152, 160 (1993) ("Congress' goal was to bar categorically a transaction that was likely to injure the pension plan."). The only limit imposed on the relief authorized by § 502(a)(3) is that it be in the form of injunctive or "other appropriate equitable relief." *Id.* In *Varity*, the Court stated that "[t]he words of subsection (3) – 'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title' – are broad enough to cover individual relief for breach of a fiduciary obligation." 516 U.S. at 510. Similarly, those same words and/or the words "appropriate equitable relief" to "enforce any provisions of this title" are "broad enough to cover" equitable relief against a nonfiduciary party in interest.

Moreover, if Congress had intended to limit § 502(a)(3)'s enforcement authority, it would not have used the phrase "any" to describe the type of Title I "violations" that are remediable under that section, or to describe the Title I violations that the courts may "enforce" under that section. *See Inter-Modal Rail Employees Association v. Atchison, Topeka and Santa Fe Railway Co.*, 520 U.S. at 515. ("Had Congress intended . . . , it could have easily" done so.). In other words, the use of the term "any" indicates Congress' intent to make claims against

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[5] The party in interest rules at issue in this case state in relevant part -

> (a)(1) A fiduciary with respect to the plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect–
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan[.]

Sections 406(a)(1)(A) &(D), 29 U.S.C. §§ 1106(a)(1)(A) &(D).



nonfiduciary parties in interest seeking to remedy prohibited transactions enforceable under § 502(a)(3). *See City of Edmonds v. Oxford House, Inc.*, 514 U.S. 725, 739 n.1 (1995) ("A broad construction of the word 'any' is hardly novel.") (*citing John Hancock Mutual Life Insurance Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 96 (1993)); *Citizens' Bank v. Parker*, 192 U.S. 73, 81 (1904) ("The word any excludes selection or distinction.").

### C. ERISA's Civil Enforcement Scheme Confirms That ERISA § 502(a)(3) Should Be Read to Authorize Equitable Relief Against a Nonfiduciary Party in Interest Which Has Engaged in a Prohibited Transaction.

The language of § 502(a)(3) authorizing an action against a nonfiduciary party in interest for violation of the prohibited transaction rules or to enforce those rules is consistent with ERISA's "carefully integrated civil enforcement" scheme under § 502(a). *Mertens*, 508 U.S. at 252 (*citing Russell*, 473 U.S. at 146). Sections 502(a)(2)[6] and 502(a)(3) provide independent methods for remedying a prohibited transaction. Whereas § 502(a)(2) authorizes broad recovery for a plan by providing both legal and equitable relief against fiduciaries to remedy a prohibited transaction, § 502(a)(3) authorizes more limited relief against nonfiduciary parties in interest by providing only for equitable relief to "redress" a prohibited transaction or to "enforce" ERISA's prohibited transaction provisions. Thus, § 502(a)(3) fits into ERISA's "integrated" enforcement scheme by, *inter alia*, authorizing actions for different relief against nonfiduciary parties in interest where there have been violations

---

[6] Section 502(a)(2) states -

> A civil action may be brought . . .
>
> (2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 409.

29 U.S.C. § 1132(a)(2).

of the prohibited transaction rules in situations when plan-based relief against a fiduciary is not available, not adequate, or not appropriate. Indeed, any other construction would render § 502(a)(3) superfluous to § 502(a)(2) in remedying a prohibited transaction. *Russell*, 473 U.S. at 144. Looked at another way, any other construction would read § 502(a) as limiting prohibited transaction remedies to those set forth in § 409. However, as the Court rhetorically asked in *Varity*: "why should one believe that Congress intended the specific remedies in § 409 as a limitation?" 516 U.S. at 511.

In *Russell*, the Court succinctly stated:

> The assumption of inadvertent omission is rendered especially suspect upon close consideration of ERISA's interlocking, interrelated, and interdependent remedial scheme, which is in turn part of a "comprehensive and reticulated statute." [Citation omitted].

Just as that scheme provides "strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly," *Mertens*, 508 U.S. at 254 (1993) (*citing Russell*, 473 U.S. at 146-47), it also provides strong evidence that Congress did not forget to incorporate limitations, such as that articulated by the Seventh Circuit and urged by Respondent here.[7]

To the contrary, in *Varity Corp. v. Howe*, the Court read § 502(a)(3), which is at issue here, as a "catch-all" provision authorizing equitable relief for all violations of ERISA not otherwise remediable under § 502. Thus, in upholding a

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[7] In contrast, Congress was extremely specific about who could assert what causes of actions under each specific subsection of § 502(a). *Compare* § 502(a)(1) (only participants or beneficiaries) *with* § 502(a)(2) (participants, beneficiaries, fiduciaries and the Secretary of Labor) *with* §§ 502(a)(5) & (6) (only the Secretary). However, nowhere in ERISA's civil enforcement scheme does it limit <u>who</u> may be sued.



reading of § 502(a)(3) allowing individual relief for breaches of fiduciary duty, the Court reasoned as follows:

> Such a reading is consistent with § 502's overall structure. Four of that section's six subsections focus upon specific areas, *i.e.*, the first (wrongful denial of benefits and information), the second (fiduciary obligations related to the plan's financial integrity), the fourth (tax registration), and the sixth (civil penalties). The language of the other two subsections, the third and the fifth, creates two "catchalls," providing "appropriate equitable relief" for "any" statutory violation. This structure suggests that these "catchall" provisions act as a safety net, offering appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy. And, contrary to *Varity*'s argument, there is nothing in the legislative history that conflicts with this interpretation. See S. Rep. No. 93-127, p. 35 (1973), 1 Leg. Hist. 621 (describing Senate version of enforcement provisions as intended to "provide both the Secretary and participants and beneficiaries with broad remedies for redressing or preventing violations of [ERISA]"); H.R. Rep. No. 93-533, at 17, 2 Leg. Hist. 2364 (describing House version in identical terms).

*Varity*, 516 U.S. at 512.

As explained above, nothing in the wording of § 502(a)(3) would foreclose application of that same "safety net" to the prohibited transaction claim at issue here. Application of that "safety net" will allow the imposition of "appropriate equitable relief . . . to redress . . . violations" of Section 406, which is one of the "provisions of" Title I, *see* § 502(a)(3)(B), where § 502 does not elsewhere adequately remedy" the injury, *Varity*, 516 U.S. at 512, or enforce the statute.

*Varity* also compels the rejection of an argument advanced by the Seventh Circuit; to wit, that because § 502(a)(6) provides

a specific cause of action by the Secretary of Labor to sue a nonfiduciary party in interest for a civil penalty, there can be no cause of action under the "catchall" provision of § 502(a)(3). In *Varity*, the defendant employer contended that, under the canon that "the specific governs the general,"the articulation of a specific remedy in § 409, enforceable through § 502(a)(2), foreclosed any remedy under the general wording of § 502(a)(3). The Court rejected this contention. *Varity*, 516 U.S. at 512. Similarly, the existence in § 502(a)(6) of a specific penalty remedy for a prohibited transaction does not foreclose imposition of other remedies under the more general wording of § 502(a)(3).

Moreover, contrary to the Seventh Circuit's conclusion, nothing in § 406(a), 29 U.S.C. § 1106(a), mandates any contrary conclusion. Reduced to its essence, that court's opinion rested on the proposition that because § 406(a) limits prohibited transactions to those which are caused by fiduciaries and says nothing about liability of nonfiduciaries, nonfiduciaries may not be sued under ERISA. However, this reasoning confuses ERISA's substantive provisions with its civil enforcement provisions. If anything is clear from this Court's analysis of ERISA, it is the fact that § 502, and only § 502, governs the issue of who may sue for what relief under ERISA. See discussion in Section A, above, regarding ERISA's "carefully integrated enforcement scheme" and its place in the "comprehensive and reticulated statute."

Consequently, the mere fact that § 406(a) defines a party in interest transaction as one caused by a fiduciary is simply irrelevant to the interpretation of § 502(a)(3). Once a transaction described in § 406(a) is shown to have been caused by a fiduciary, then the courts are specifically permitted to grant "any" equitable relief to redress such violations or to otherwise enforce § 406. *Cf. Mertens* (sought-after relief against nonfiduciary party in interest not available because it was legal, not equitable).

Accordingly, ERISA's enforcement scheme supports *amici*'s interpretation of § 502(a)(3).



### D. ERISA's Basic Purpose Corroborates the Plain Meaning of ERISA § 502(a)(3) Authorizing Equitable Relief Against a Nonfiduciary Party in Interest Which Engages in a Prohibited Transaction.

Given the language of § 502(a)(3) and the structure of ERISA, the Court need not look behind the statute in order to decide the question before it. However, in *Varity*, the Court supplemented its analysis of the language and structure of § 502 by discussing the policies underlying ERISA. It concluded that "ERISA's basic purposes favor a reading of the third subsection [§ 502(a)(3)] that provides the plaintiffs with a remedy." 516 U.S. at 513. The Court has consistently recognized that "ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 137 (1990) *(citing Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 90 (1983)); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113 (1989). ERISA's underlying policy is to protect the interests of participants and beneficiaries in employee benefit plans by "establishing standards of conduct, responsibility, and obligation for fiduciaries" and "by providing for appropriate remedies and sanctions" for violations of these fiduciary standards. ERISA § 2(b), 29 U.S.C. § 1001(b). *See Varity*, 516 U.S. at 513.

Construing § 502(a)(3) as authorizing relief against nonfiduciary parties in interest is clearly within the scope of ERISA's remedial purposes of protecting the interests of participants and beneficiaries in employee benefit plans. Providing this avenue of relief is consistent with ERISA's structure – ERISA requires bonding solely to cover losses caused by fraud and dishonesty.[9] And, ERISA has no

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[9] ERISA requires every fiduciary of an employee benefit plan and every person who handles funds or other property of the plan to be bonded. However, the bond's coverage is limited to acts of fraud or dishonesty against the plan. Section 412, 29 U.S.C. § 1112. The amount of the bond need only be 10 per cent of the plan's assets, and the maximum amount of

(continued...)

requirement that plans and/or fiduciaries maintain fiduciary liability insurance to cover any liability or losses from their imprudent behavior. Dan M. McGill, *et al.*, FUNDAMENTALS OF PRIVATE PENSIONS at 59 (7th ed. 1996). It is solely within the discretion of a plan and its fiduciaries to purchase such insurance and to determine the liability limits. Moreover, these policies often deduct defense costs from the liability limits. Finally, these policies infrequently pay damage awards because of numerous exclusions and limitations and the equitable nature of most claims. Joan M. Dolinsky, *Fiduciary Liability Coverage -- An Overview*, American Bar Association, SECTION OF LABOR AND EMPLOYMENT LAW PROGRAM MATERIALS, ANNUAL MEETING, Atlanta, GA 1999, at 767. *See also*, Arthur J. Dreschler & Jennifer Oliver, *Rules to Follow to Protect Yourself from Fiduciary Liability Claims*, PROFIT SHARING, May 1995, at 14 (listing various types of exclusions); Richard G. Ritchie, *Fiduciary Insurance Coverage*, EMPLOYEE BENEFIT ISSUES -- THE MULTIEMPLOYER PERSPECTIVE 1998, at 386 (International Foundation of Employee Benefit Plans) ("policies are 'self-exhausting' or 'wasting limits' policies in that they provide that defense costs and expenses . . . are part of the limits and not in addition to them"); Robert G. Gallagher & Angela C. Montez, *Fiduciary Liability Insurance – You Paid The Premium, Now Why Won't They Pay the Claim?* EMPLOYEE BENEFIT ISSUES – THE MULTIEMPLOYER PERSPECTIVE 1995, at 445 (International Foundation of Employee Benefit Plans) (policies paying defense costs in addition to limits "have been unavailable in recent years"; "policy limits could be exhausted on defense costs with the result that no funds would be available to satisfy any judgment").

Moreover, as one commentator has noted:

> Unfortunately, there is often confusion and misunderstanding as to the insurance necessary to cover these four areas of liability. For example, it

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[9](...continued)
the bond is only $500,000. Section 412(a), 29 U.S.C. § 1112(a).



> is not uncommon for trustees to believe [incorrectly] that their bonding insurance covers fiduciary liability, that professional liability insurance covers ERISA fiduciary liability. . . .

Jeffrey D. Mamorsky, *Fiduciary Liability Insurance: Are You Really Protected?* EMPLOYEE BENEFIT ISSUES -- THE MULTIEMPLOYER PERSPECTIVE 1996, at 459-460 (International Foundation of Employee Benefit Plans).

Consequently, it is unrealistic to expect that plans and participants will be made whole in all cases for violations of ERISA's party-in-interest rules through insurance. Indeed, in many cases, the only viable method for making plans and participants whole is to be able to sue nonfiduciary parties in interest for equitable relief.

Any construction of § 502(a)(3) other than according to its plain language, which does not limit who may be sued, would result in the permanent loss of plan assets wrongly transferred to parties in interest. Such a result clearly is contrary to ERISA's stated policy, recognized by this Court, *Shaw v. Delta Air Lines Inc.*, 463 U.S. at 90, of protecting the interests of participants and beneficiaries in employee benefit plans.

## CONCLUSION

The Court's three previous interpretations of ERISA's civil enforcement provisions, the relevant text of § 502(a)(3), the structure of the statute's entire enforcement scheme, and the purposes of the Act all support the conclusion that ERISA § 502(a)(3) authorizes equitable relief against a nonfiduciary party in interest which engages in a prohibited transaction. For the foregoing reasons, AARP and the National Employment Lawyers Association urge the Court to reverse the decision of the Seventh Circuit Court of Appeals.

Respectfully submitted,

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IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

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v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR THE BOND MARKET ASSOCIATION AND THE SECURITIES INDUSTRY ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

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## QUESTION PRESENTED

Whether Section 406 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1106, renders nonfiduciary parties in interest subject to private civil actions under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), for entering into prohibited transactions.

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v.

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*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit**

## BRIEF FOR THE BOND MARKET ASSOCIATION AND THE SECURITIES INDUSTRY ASSOCIATION AS *AMICI CURIAE* SUPPORTING RESPONDENTS

### INTEREST OF *AMICI CURIAE*

The Bond Market Association and the Securities Industry Association (together, the "Associations") respectfully submit this brief in support of respondents.[1]

[1] This brief is accompanied by the written consents of all parties, which are being filed concurrently with the Clerk of the Court, as specified in Supreme Court Rule 37.3. No counsel for any party authored any portion of this brief. No persons other than *amici curiae* and their members, through the Associations' general dues and assessments, made a monetary contribution to the preparation and submission of this brief.

The Bond Market Association represents approximately 200 securities firms and banks that underwrite, trade, and sell fixed-income securities in the U.S. and international markets. The Bond Market Association's members deal in a wide variety of public and private fixed-income securities. All of the primary dealers of Treasury bonds, notes, and bills, as recognized by the Federal Reserve Bank of New York, are members of The Bond Market Association, as are other securities dealers.

From its inception in 1976 (and under its prior name of the Public Securities Association), The Bond Market Association has addressed significant issues confronting the U.S. government and securities markets and has sought to foster sound credit, business, and trading practices for participants in the fixed-income securities market. Among other activities, the Association provides a market perspective on securities legislation and regulation and undertakes numerous industry initiatives to improve industry practices and market efficiency.[2]

The Securities Industry Association (the "SIA") brings together the shared interests of more than 740 securities firms throughout North America. The SIA's members—including investment banks, broker-dealers, specialists, and mutual fund companies—are active in all markets and in all phases of corporate and public finance. In the United States, the SIA member firms collectively account for approximately 90% of securities firms' annual revenues and employ more than 600,000 individuals. The

[2] The Bond Market Association has filed other *amicus* briefs concerning regulation of the this country's bond market, including *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kravitz*, 135 F.3d 266 (3d Cir.), *cert. denied*, 525 U.S. 811 (1998), *NACCO Indus. v. Tracy*, 681 N.E. 2d 900 (Ohio 1997), *cert. denied*, 522 U.S. 1091 (1998), and *Dunn v. CFTC*, 519 U.S. 465 (1997). More information about the Bond Market Association may be found on its web site: http://www.bondmarkets.com.



U.S. securities industry maintains the accounts of approximately 50 million investors directly, and tens of millions of investors indirectly, through corporate, thrift, and pension plans.[3]

The Associations' members directly, or indirectly through affiliates, engage in transactions with employee benefit plans [4] and some may also provide services to them in a variety of capacities. They are also active issuers of equity and debt securities, which plans may choose as investments. The roles that the Associations' members play in the markets are ever increasing because of consolidation in the financial services industry and the evolution of financial products. For example, a broker-dealer could participate in the markets as an issuer, a trader, an investment manager, a custodian, and a trustee. In today's market place, some financial services firms that participate in these various capacities may often assume for business planning purposes that they could be alleged to be "providing services" to plans and thus could be alleged to be "parties in interest" [5] under the Employee Retirement Income Security Act of 1974 ("ERISA"). Accordingly, their dealings with employee benefit plans may be alleged to be subject to the prohibited transaction rules of ERISA.

[3] In the last two years, the SIA filed 16 *amicus* briefs in federal courts, including nine in this Court. More information about the SIA is available on its home page: http://www.sia.com.

[4] The terms "employee benefit plan," "benefit plan," and "plan" are used interchangeably throughout this brief.

[5] A party in interest is defined as, among other things, any person providing services to the plan, an employer any of whose employees are covered by the plan, an employee organization whose members are covered by the plan, and certain relatives of parties in interest. *See* 29 U.S.C. § 1002(14) (1994). For purposes of this brief, we use the terms nonfiduciary party in interest and party in interest interchangeably, although a party in interest may also be a fiduciary. In this case, the courts below assumed that respondents were nonfiduciary parties in interest. *See* J.A. 299, 347.

Consequently, to the extent it is feasible and within their control, some financial service firms may generally limit transactions with plans to those types for which an exemption from the prohibited transaction rules is thought to be available. Indeed, because of the risks of penalties and taxes by the Department of Labor and the Department of the Treasury associated with engaging in prohibited transactions, many financial institutions will not transact with plans at all unless an exemption is considered available.

As nonfiduciary parties in interest factor the risk of litigation into the costs of engaging in financial transactions with plans, they may determine that some of those transactions are no longer viable. Thus, the proposed cause of action here could constrain competition by decreasing the number of available or attractive investment opportunities for plans. Employee benefit plans, however, play a critical role in U.S. capital markets and any decrease in the number of transactions with plans could significantly affect the securities markets as a whole. This likely chilling effect on plans' investment and market activities could reduce liquidity in the capital markets and raise the cost of capital for all borrowers and those seeking equity capital—from the average home buyer to the Fortune 500 corporation.

Bearing in mind the importance of plans to the securities markets, the Associations believe there are important legal principles at issue here involving the exposure of nonfiduciary parties in interest to private lawsuits for alleged participation in prohibited transactions. The Associations' participation as *amici curiae* in this proceeding is prompted by their strong interest in ensuring (i) that the judicial treatment of these transactions accurately reflects the text of ERISA and the policies and purposes underlying the statute and (ii) that securities firms and banks transacting with employee benefit plans have ap-



propriate and consistent guidance, ensuring an environment of greater legal certainty that will foster stability and efficiency in the marketplace.

## SUMMARY OF ARGUMENT

ERISA is a comprehensive statute. As such, ERISA is complete with its own express enforcement mechanisms. The statute reflects the balance Congress struck between operating employee benefit plans efficiently and protecting those plans effectively. That balance does not provide for a private cause of action against nonfiduciary parties in interest allegedly involved in prohibited transactons.

The creation of a private cause of action against nonfiduciary parties in interest would likely harm the long-term interests of plans, their participants, and beneficiaries. Subjecting nonfiduciaries to litigation for transactions that are later considered—with hindsight—to be non-exempt will drive up the costs and risks associated with conducting business with plans. A private plaintiff potentially could sue a nonfiduciary any time a transaction turned out to be unfavorable to the plan. When faced with the possibility of incurring such costs, nonfiduciary parties in interest would at a minimum try to pass those costs on to plans and may even limit their transactions with plans.

Moreover, this chilling effect could spill over to the securities markets as a whole. The number of market participants that could be affected by a private cause of action is quite substantial, considering that consolidation in the financial services sector means that more and more entities transacting business with plans could be deemed "related". Many counterparties to transactions often may have to assume that they could be alleged to be parties in interest. As more nonfiduciaries limit transactions with

plans due to their fear of private litigation, plans inevitably would become less active participants in the capital markets—reducing overall liquidity and ultimately increasing the cost of capital.

These underlying policy considerations, among others, led Congress to create an integrated system of enforcement under ERISA to protect plans. Such a comprehensive system, as this Court has repeatedly recognized, creates a presumption against implying a private cause of action. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). Insofar as the rules against prohibited transactions are concerned, the system has several facets designed to protect the interests of plans. First, Congress created an administrative exemption scheme under ERISA and authorized the Department of Labor to grant exemptions. The Department of Labor has adopted final exemption procedures requiring that exemptions, among other things, be in the interest and protective of plans and their participants and beneficiaries. These exemptions are quite complex and often are issued after much consultation between the Department of Labor and market participants. Congress did not intend for private suits against nonfiduciary parties in interest to be the mechanism for interpreting these complex exemptions. Instead, Congress placed with the Department of Labor and the Department of the Treasury the primary responsibility for enforcement of the rules and exemptions related to prohibited transactions between plans and nonfiduciary parties in interest.

Next, ERISA provides express remedies to recover funds from parties in interest involved in prohibited transactions. Rather than creating a private cause of action against nonfiduciary parties in interest, Congress allows



the Department of Labor or the Internal Revenue Service (the "IRS") to penalize or tax certain parties in interest for their participation in prohibited transactions. In addition to the initial assessment, a party in interest can be fined or taxed up to 100% of the amount involved in the transaction, if it does not undo the transaction.

Finally, Congress placed on fiduciaries the primary responsibility for protecting the interests of plans. If private suits against nonfiduciary parties in interest were allowed, fiduciaries could seek to shift their liability to nonfiduciaries—an action not authorized by the statute. When trying to determine whether a transaction is prohibited or exempt, it is often necessary for a nonfiduciary to rely to a great extent upon the fiduciary's knowledge. If the liability for such a decision can be shifted to the nonfiduciary (as petitioners are trying to do here), the fiduciary's incentive to act with the care, skill, prudence, and diligence required of it to avoid a prohibited transaction could diminish.

The text of ERISA confirms that Congress did not provide for private litigation against nonfiduciary parties in interest. Neither ERISA Section 502(a)(3), Section 406(a), nor a combination of the two provisions creates a private cause of action against nonfiduciary parties in interest. Section 502(a)(3) allows private suits only to remedy violations of ERISA; it does not expand the universe of persons who may be sued. *See Mertens*, 508 U.S. at 253. The claim that a nonfiduciary (including a party in interest) can violate Section 406, and thus be subjected to a private suit under Section 502(a)(3), is without merit. The plain language of Section 406 requires only that a *fiduciary* shall not cause a plan to engage in a prohibited transaction.

## ARGUMENT

### I. A PRIVATE CAUSE OF ACTION WOULD UNNECESSARILY DISRUPT THE OPERATION OF EMPLOYEE BENEFIT PLANS AND SECURITIES MARKETS.

ERISA seeks to protect employee benefit plans against self-dealing, conflicts of interest, and other abuses while at the same time facilitating the efficient operation of those plans. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) (there is a "tension between the primary goal of benefiting employees and the subsidiary goal of containing pension costs"). One of the statutory safeguards is the prohibition of transactions between plans and parties in interest. *See* ERISA § 406. Congress, however, allowed for statutory and administrative exemptions to those prohibited transaction rules, *see* ERISA § 408, "in order not to disrupt the established business practices of financial institutions"—as long as there are satisfactory protections for plans. H.R. CONF. REP. No. 93-1280, at 309 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5,038, 5,089. Judicially creating a private cause of action against nonfiduciary parties in interest would frustrate, not further, Congress's goals.

#### A. The Proposed Cause Of Action Would Escalate The Cost Of Maintaining And Administering Plans And Decrease The Number Of Investment Opportunities Available To Plans.

Petitioners' proposed cause of action (and seemingly open-ended theory of liability) would raise unnecessarily the costs for plans to engage in financial transactions with service providers as well as lead to needless inefficiencies. Nonfiduciary parties in interest would face increased exposure to liability and naturally would become more conservative when dealing with plans. In an effort to protect



themselves, nonfiduciary parties in interest may seek more extensive representations or even indemnification from plans and their fiduciaries regarding compliance with the prohibited transaction rules or exemptions from those rules.[6] In the context of negotiation, however, some plans may not agree to such representations or indemnification. In the end, plans could find themselves unable to participate as broadly in the capital markets as they do today.

Alternatively, if nonfiduciary parties in interest are required to bear fiduciary-like responsibilities, they may seek, with greater certainty, assurance that the transactions meet the conditions of the exemptions.[7] They would incur the increased costs of directly ascertaining certain information about plans and their fiduciaries. One must assume that parties in interest, to the extent possible, would pass these increased compliance costs onto plans. Also, parties in interest may exact a risk premium, as self-insurance in the event that they get some of the information wrong. Thus, the plans unnecessarily would pay more in the future for the same investments. As this Court previously explained:

> All that ERISA has eliminated . . . is the common law's joint and several liability, for all direct and consequential damages suffered by the plan, on the part of persons who had no real power to control what the plan did. Exposure to that sort of liability would impose high insurance costs upon persons who

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[6] However, if those representations turn out to be false, under petitioners' theory of liability, the nonfiduciary party in interest would still be subject to a private cause of action as a result of the fiduciary's breach of its responsibilities.

[7] Parties in interest for the most part may have to obtain the necessary information from the plans themselves and would potentially encounter the plans' or the fiduciaries' reluctance to provide such information.

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Costs to plans could also increase because the number of available trading partners may decrease. There has been significant consolidation in the financial services markets, as affiliations among banks, investment advisors, and broker-dealers have increased substantially.[8] This changing landscape makes it more likely that these counterparties will be deemed "related" and thus exposed to the proposed cause of action as nonfiduciary parties in interest. A nonfiduciary party in interest may discover that it cannot competitively price a financial product at a level that compensates it for the increased compliance burden and risk. As a result, firms may eliminate some investment choices for plans. These increased costs and reduced investment opportunities could even limit plans' abilities to diversify their portfolios and manage risks. Under petitioners' proposal, therefore, "desirable investment opportunities may be foreclosed for employee benefit plans . . . [and] as a result capital markets may be disrupted."[9]

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### B. A Private Cause of Action Would Be Detrimental To Securities Markets.

Employees benefit plans are major market participants, ensuring capital adequacy in our markets. As of September 1999, private pension plans held nearly $5.0 trillion of financial assets.[10] Nearly $1.0 trillion of that amount consisted of bonds and other debt instruments. According to the most recent data available, there are more than 6 million private health and welfare plans covering more than 150 million participants and beneficiaries and almost 700,000 private pension plans covering more than 90 million participants.[11] Private pension plans are major holders of corporate stocks and bonds, holding an estimated 20% of all outstanding stocks and 17% of all outstanding bonds.[12] Plans are critical to and benefit from the securities markets' depth and liquidity. Their participation in the markets helps to lower financing costs for corporations, governments, homebuyers, consumer borrowers, and many others who regularly go to the markets to finance investments.

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seriously impede the ability of employee benefit plans to participate fully in the capital markets. Accordingly, the high liquidity and price efficiency of U.S. capital markets could be adversely affected, to the detriment of plans, participants, and beneficiaries.

## II. BECAUSE ERISA EXPRESSLY PROVIDES FOR AN INTEGRATED SYSTEM OF ENFORCEMENT, PETITIONERS CANNOT OVERCOME THE STRONG PRESUMPTION AGAINST IMPLYING A PRIVATE CAUSE OF ACTION.

There is no need for this Court to read an implied private cause of action under Section 502 of ERISA when Congress elsewhere has provided for remedies with respect to nonfiduciary parties in interest. Indeed, the Court has recognized the strong presumption against inferring a cause of action when Congress has already provided an integrated system for enforcement. *See Texas Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 645 (1981) (quoting *Northwest Airlines, Inc. v. Transport Workers*, 451 U.S. 77, 97 (1981) ("The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement.")). ERISA is just such a comprehensive statute. Indeed, this Court has already recognized that new causes of action should not be inferred in the ERISA context:

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ERISA protects plans in a number of ways, making a private cause of action against nonfiduciary parties in interest unwarranted. First, the Department of Labor grants administrative exemptions to allow plans to take advantage of investment opportunities while at the same time (1) safeguarding the interests of plans and (2) providing a safe harbor for nonfiduciary parties in interest that engage in transactions that otherwise might be prohibited. Second, in the event that nonfiduciary parties in interest participate in non-exempt prohibited transactions, the Department of Labor and the Department of the Treasury are statutorily authorized to impose penalties and excise taxes upon certain parties in interest. Finally, and of greatest import, is the role that fiduciaries play in protecting plans. Congress established fiduciaries as the centerpiece of ERISA's protective scheme. A private cause of action against a nonfiduciary party in interest could allow a fiduciary simply to sidestep its responsibilities with respect to a prohibited transaction. Congress chose each of these measures to protect the interests of plans and their participants and beneficiaries. The supplementary remedy petitioners seek here is unnecessary and unfounded.

### A. Petitioners' Argument For A Private Cause Of Action Disregards ERISA's Complex Administrative Scheme Of Exemptions.

Congress empowered the Department of Labor, in consultation with the Department of the Treasury, to administer a system of exemptions to allow plans to engage in transactions with parties in interest that may otherwise technically violate the statute. The Department of Labor grants exemptions when it determines that the conditions of the exemptions and other regulatory regimes provide sufficient protection for plans and that beneficiaries and participants would benefit from a wider universe of op-

tions.[13] Before granting an exemption, the Department of Labor must determine that the exemption is (1) administratively feasible, (2) in the interest of the plan and its participants and beneficiaries, and (3) protective of the rights of participants and beneficiaries. *See* ERISA § 408(a). Moreover, some exemptions require that transactions be effected "on terms at least as favorable to the plan as an arm's-length transaction with an unrelated party would be."[14]

The exemptions protect the interests of plans, fiduciaries, and nonfiduciary parties in interest transacting business with plans.[15] In the event that questions arise as to whether a transaction between a plan and a party in interest met the conditions of particular exemption, Congress intended for these matters to be addressed in the first instance through the administrative process. Congress did not provide for these complicated, fact-driven exemptions to be interpreted in hostile civil litigation against nonfiduciaries. Rather it authorized the Department of Labor, which has expertise in these matters and is equipped to understand the exemptions, to do so.

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15 As explained above, increasing the level of risk experienced by parties transacting with plans could be harmful to plans, participants, and beneficiaries. Thus, Congress authorized the Department of Labor to create these safe habors.



PTE 75-1, 40 Fed. Reg. at 50,850.[16] Contrasting that exemption with the amendment to the Underwriters Exemptions, however, underscores Congress's reasons for placing this process within the administrative realm.[17] These exemptions are complex and have grown out of the coordinated efforts of the Department of Labor and market participants. To have their nuances interpreted in the first instance in private litigation against nonfiduciaries rather than through administrative deliberation would be inappropriate and harmful to the interests of plans. Although petitioners argue that judicial intervention is now necessary to protect plans, Congress simply did not agree. Petitioners' approach would increase the systemic risks of transacting with plans without providing countervailing benefits to plans or their participants and beneficiaries.

**B. Other Enforcement Mechanisms Govern A Nonfiduciary Party In Interest's Involvement In Prohibited Transactions And Adequately Protect Plans.**

Although a nonfiduciary party in interest cannot itself violate Section 406, that does not mean that it has no independent incentive to avoid entering into a prohibited transaction. Congress did not exclude nonfiduciary parties in interest from all of the enforcement provisions of ERISA. To the contrary Congress's inclusive enforcement

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16 Yet as this very case shows, even this exemption, when subject to private litigation against alleged nonfiduciary parties in interest creates vexing questions. *See* J.A. 313-20 (district court's discussion of whether participation interests in question were "securities").

17 *See* Amendment to Prohibited Transaction Exemptions (PTEs) 90-30 Involving Bear, Stearns & Co. Inc., 90-32 Involving Prudential Securities Incorporated, et al., 62 Fed. Reg. 39,021 (1997). This exemption is five Federal Register pages long. The Underwriter Exemptions are individual exemptions that provide relief for the certain transactions involving asset pool investment trusts and asset backed pass-through certificates. *See id.*

The Bond Market Association represents approximately 200 securities firms and banks that underwrite, trade, and sell fixed-income securities in the U.S. and international markets. The Bond Market Association's members deal in a wide variety of public and private fixed-income securities. All of the primary dealers of Treasury bonds, notes, and bills, as recognized by the Federal Reserve Bank of New York, are members of The Bond Market Association, as are other securities dealers.

From its inception in 1976 (and under its prior name of the Public Securities Association), The Bond Market Association has addressed significant issues confronting the U.S. government and securities markets and has sought to foster sound credit, business, and trading practices for participants in the fixed-income securities market. Among other activities, the Association provides a market perspective on securities legislation and regulation and undertakes numerous industry initiatives to improve industry practices and market efficiency.[2]

The Securities Industry Association (the "SIA") brings together the shared interests of more than 740 securities firms throughout North America. The SIA's members—including investment banks, broker-dealers, specialists, and mutual fund companies—are active in all markets and in all phases of corporate and public finance. In the United States, the SIA member firms collectively account for approximately 90% of securities firms' annual revenues and employ more than 600,000 individuals. The

[2] The Bond Market Association has filed other *amicus* briefs concerning regulation of the this country's bond market, including *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Kravitz*, 135 F.3d 266 (3d Cir.), *cert. denied*, 525 U.S. 811 (1998), *NACCO Indus. v. Tracy*, 681 N.E. 2d 900 (Ohio 1997), *cert. denied*, 522 U.S. 1091 (1998), and *Dunn v. CFTC*, 519 U.S. 465 (1997). More information about the Bond Market Association may be found on its web site: http://www.bondmarkets.com.



U.S. securities industry maintains the accounts of approximately 50 million investors directly, and tens of millions of investors indirectly, through corporate, thrift, and pension plans.[3]

The Associations' members directly, or indirectly through affiliates, engage in transactions with employee benefit plans [4] and some may also provide services to them in a variety of capacities. They are also active issuers of equity and debt securities, which plans may choose as investments. The roles that the Associations' members play in the markets are ever increasing because of consolidation in the financial services industry and the evolution of financial products. For example, a broker-dealer could participate in the markets as an issuer, a trader, an investment manager, a custodian, and a trustee. In today's market place, some financial services firms that participate in these various capacities may often assume for business planning purposes that they could be alleged to be "providing services" to plans and thus could be alleged to be "parties in interest" [5] under the Employee Retirement Income Security Act of 1974 ("ERISA"). Accordingly, their dealings with employee benefit plans may be alleged to be subject to the prohibited transaction rules of ERISA.

[3] In the last two years, the SIA filed 16 *amicus* briefs in federal courts, including nine in this Court. More information about the SIA is available on its home page: http://www.sia.com.

[4] The terms "employee benefit plan," "benefit plan," and "plan" are used interchangeably throughout this brief.

[5] A party in interest is defined as, among other things, any person providing services to the plan, an employer any of whose employees are covered by the plan, an employee organization whose members are covered by the plan, and certain relatives of parties in interest. *See* 29 U.S.C. § 1002(14) (1994). For purposes of this brief, we use the terms nonfiduciary party in interest and party in interest interchangeably, although a party in interest may also be a fiduciary. In this case, the courts below assumed that respondents were nonfiduciary parties in interest. *See* J.A. 299, 347.

Consequently, to the extent it is feasible and within their control, some financial service firms may generally limit transactions with plans to those types for which an exemption from the prohibited transaction rules is thought to be available. Indeed, because of the risks of penalties and taxes by the Department of Labor and the Department of the Treasury associated with engaging in prohibited transactions, many financial institutions will not transact with plans at all unless an exemption is considered available.

As nonfiduciary parties in interest factor the risk of litigation into the costs of engaging in financial transactions with plans, they may determine that some of those transactions are no longer viable. Thus, the proposed cause of action here could constrain competition by decreasing the number of available or attractive investment opportunities for plans. Employee benefit plans, however, play a critical role in U.S. capital markets and any decrease in the number of transactions with plans could significantly affect the securities markets as a whole. This likely chilling effect on plans' investment and market activities could reduce liquidity in the capital markets and raise the cost of capital for all borrowers and those seeking equity capital—from the average home buyer to the Fortune 500 corporation.

Bearing in mind the importance of plans to the securities markets, the Associations believe there are important legal principles at issue here involving the exposure of nonfiduciary parties in interest to private lawsuits for alleged participation in prohibited transactions. The Associations' participation as *amici curiae* in this proceeding is prompted by their strong interest in ensuring (i) that the judicial treatment of these transactions accurately reflects the text of ERISA and the policies and purposes underlying the statute and (ii) that securities firms and banks transacting with employee benefit plans have ap-



propriate and consistent guidance, ensuring an environment of greater legal certainty that will foster stability and efficiency in the marketplace.

## SUMMARY OF ARGUMENT

ERISA is a comprehensive statute. As such, ERISA is complete with its own express enforcement mechanisms. The statute reflects the balance Congress struck between operating employee benefit plans efficiently and protecting those plans effectively. That balance does not provide for a private cause of action against nonfiduciary parties in interest allegedly involved in prohibited transactons.

The creation of a private cause of action against nonfiduciary parties in interest would likely harm the long-term interests of plans, their participants, and beneficiaries. Subjecting nonfiduciaries to litigation for transactions that are later considered—with hindsight—to be non-exempt will drive up the costs and risks associated with conducting business with plans. A private plaintiff potentially could sue a nonfiduciary any time a transaction turned out to be unfavorable to the plan. When faced with the possibility of incurring such costs, nonfiduciary parties in interest would at a minimum try to pass those costs on to plans and may even limit their transactions with plans.

Moreover, this chilling effect could spill over to the securities markets as a whole. The number of market participants that could be affected by a private cause of action is quite substantial, considering that consolidation in the financial services sector means that more and more entities transacting business with plans could be deemed "related". Many counterparties to transactions often may have to assume that they could be alleged to be parties in interest. As more nonfiduciaries limit transactions with

plans due to their fear of private litigation, plans inevitably would become less active participants in the capital markets—reducing overall liquidity and ultimately increasing the cost of capital.

These underlying policy considerations, among others, led Congress to create an integrated system of enforcement under ERISA to protect plans. Such a comprehensive system, as this Court has repeatedly recognized, creates a presumption against implying a private cause of action. *See, e.g., Mertens v. Hewitt Assocs.*, 508 U.S. 248, 254 (1993); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). Insofar as the rules against prohibited transactions are concerned, the system has several facets designed to protect the interests of plans. First, Congress created an administrative exemption scheme under ERISA and authorized the Department of Labor to grant exemptions. The Department of Labor has adopted final exemption procedures requiring that exemptions, among other things, be in the interest and protective of plans and their participants and beneficiaries. These exemptions are quite complex and often are issued after much consultation between the Department of Labor and market participants. Congress did not intend for private suits against nonfiduciary parties in interest to be the mechanism for interpreting these complex exemptions. Instead, Congress placed with the Department of Labor and the Department of the Treasury the primary responsibility for enforcement of the rules and exemptions related to prohibited transactions between plans and nonfiduciary parties in interest.

Next, ERISA provides express remedies to recover funds from parties in interest involved in prohibited transactions. Rather than creating a private cause of action against nonfiduciary parties in interest, Congress allows



the Department of Labor or the Internal Revenue Service (the "IRS") to penalize or tax certain parties in interest for their participation in prohibited transactions. In addition to the initial assessment, a party in interest can be fined or taxed up to 100% of the amount involved in the transaction, if it does not undo the transaction.

Finally, Congress placed on fiduciaries the primary responsibility for protecting the interests of plans. If private suits against nonfiduciary parties in interest were allowed, fiduciaries could seek to shift their liability to nonfiduciaries—an action not authorized by the statute. When trying to determine whether a transaction is prohibited or exempt, it is often necessary for a nonfiduciary to rely to a great extent upon the fiduciary's knowledge. If the liability for such a decision can be shifted to the nonfiduciary (as petitioners are trying to do here), the fiduciary's incentive to act with the care, skill, prudence, and diligence required of it to avoid a prohibited transaction could diminish.

The text of ERISA confirms that Congress did not provide for private litigation against nonfiduciary parties in interest. Neither ERISA Section 502(a)(3), Section 406(a), nor a combination of the two provisions creates a private cause of action against nonfiduciary parties in interest. Section 502(a)(3) allows private suits only to remedy violations of ERISA; it does not expand the universe of persons who may be sued. *See Mertens*, 508 U.S. at 253. The claim that a nonfiduciary (including a party in interest) can violate Section 406, and thus be subjected to a private suit under Section 502(a)(3), is without merit. The plain language of Section 406 requires only that a *fiduciary* shall not cause a plan to engage in a prohibited transaction.

## ARGUMENT

### I. A PRIVATE CAUSE OF ACTION WOULD UNNECESSARILY DISRUPT THE OPERATION OF EMPLOYEE BENEFIT PLANS AND SECURITIES MARKETS.

ERISA seeks to protect employee benefit plans against self-dealing, conflicts of interest, and other abuses while at the same time facilitating the efficient operation of those plans. *See Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981) (there is a "tension between the primary goal of benefiting employees and the subsidiary goal of containing pension costs"). One of the statutory safeguards is the prohibition of transactions between plans and parties in interest. *See* ERISA § 406. Congress, however, allowed for statutory and administrative exemptions to those prohibited transaction rules, *see* ERISA § 408, "in order not to disrupt the established business practices of financial institutions"—as long as there are satisfactory protections for plans. H.R. CONF. REP. No. 93-1280, at 309 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5,038, 5,089. Judicially creating a private cause of action against nonfiduciary parties in interest would frustrate, not further, Congress's goals.

#### A. The Proposed Cause Of Action Would Escalate The Cost Of Maintaining And Administering Plans And Decrease The Number Of Investment Opportunities Available To Plans.

Petitioners' proposed cause of action (and seemingly open-ended theory of liability) would raise unnecessarily the costs for plans to engage in financial transactions with service providers as well as lead to needless inefficiencies. Nonfiduciary parties in interest would face increased exposure to liability and naturally would become more conservative when dealing with plans. In an effort to protect



themselves, nonfiduciary parties in interest may seek more extensive representations or even indemnification from plans and their fiduciaries regarding compliance with the prohibited transaction rules or exemptions from those rules.[6] In the context of negotiation, however, some plans may not agree to such representations or indemnification. In the end, plans could find themselves unable to participate as broadly in the capital markets as they do today.

Alternatively, if nonfiduciary parties in interest are required to bear fiduciary-like responsibilities, they may seek, with greater certainty, assurance that the transactions meet the conditions of the exemptions.[7] They would incur the increased costs of directly ascertaining certain information about plans and their fiduciaries. One must assume that parties in interest, to the extent possible, would pass these increased compliance costs onto plans. Also, parties in interest may exact a risk premium, as self-insurance in the event that they get some of the information wrong. Thus, the plans unnecessarily would pay more in the future for the same investments. As this Court previously explained:

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[14] *See, e.g.*, Exemptions From Prohibitions Respecting Certain Classes of Transactions Involving Employee Benefit Plans and Certain Broker-Dealers, Reporting Dealers and Banks, 40 Fed. Reg. 50,845, 50,846 (1975) [hereinafter PTE 75-1].

[15] As explained above, increasing the level of risk experienced by parties transacting with plans could be harmful to plans, participants, and beneficiaries. Thus, Congress authorized the Department of Labor to create these safe habors.



PTE 75-1, 40 Fed. Reg. at 50,850.[16] Contrasting that exemption with the amendment to the Underwriters Exemptions, however, underscores Congress's reasons for placing this process within the administrative realm.[17] These exemptions are complex and have grown out of the coordinated efforts of the Department of Labor and market participants. To have their nuances interpreted in the first instance in private litigation against nonfiduciaries rather than through administrative deliberation would be inappropriate and harmful to the interests of plans. Although petitioners argue that judicial intervention is now necessary to protect plans, Congress simply did not agree. Petitioners' approach would increase the systemic risks of transacting with plans without providing countervailing benefits to plans or their participants and beneficiaries.

**B. Other Enforcement Mechanisms Govern A Nonfiduciary Party In Interest's Involvement In Prohibited Transactions And Adequately Protect Plans.**

Although a nonfiduciary party in interest cannot itself violate Section 406, that does not mean that it has no independent incentive to avoid entering into a prohibited transaction. Congress did not exclude nonfiduciary parties in interest from all of the enforcement provisions of ERISA. To the contrary Congress's inclusive enforcement

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[16] Yet as this very case shows, even this exemption, when subject to private litigation against alleged nonfiduciary parties in interest creates vexing questions. *See* J.A. 313-20 (district court's discussion of whether participation interests in question were "securities").

[17] *See* Amendment to Prohibited Transaction Exemptions (PTEs) 90-30 Involving Bear, Stearns & Co. Inc., 90-32 Involving Prudential Securities Incorporated, et al., 62 Fed. Reg. 39,021 (1997). This exemption is five Federal Register pages long. The Underwriter Exemptions are individual exemptions that provide relief for the certain transactions involving asset pool investment trusts and asset backed pass-through certificates. *See id.*

scheme shows why it would be inappropriate to upset that scheme by implying a private cause of action. The Department of Labor can pressure certain nonfiduciary parties in interest to undo a prohibited transaction. Section 502(i) of ERISA provides in relevant part:

> In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5% of the amount involved in each such transaction . . . for each year or part thereof during which the prohibited transaction continues, except that, if the transaction is not corrected . . . such penalty may be in an amount not more than 100% of the amount involved.

29 U.S.C. § 1132(i) (1994). Further, the IRS has the power to levy taxes against certain nonfiduciary parties in interest involved in prohibited transactions. *See* 26 U.S.C. § 4975 (Supp. III 1997). Under Section 4975 of the Internal Revenue Code (the "Code" or "I.R.C."), a disqualified person (which is similar to a party in interest) involved in a prohibited transaction may be subject to a tax of up to 15% per year of the amount involved in the transaction.[18] If the disqualified person does not correct the

[18] Section 502(i) of ERISA applies to all plans except for certain tax-exempt plans, which are governed by Section 4975(a) & (b) of the Code. *See* ERISA § 502(i); I.R.C. § 4975(a) & (b). Petitioners argue that because Section 502(i) does not apply to the plan at issue in this case, the civil enforcement provisions "provide inadequate protection for plan participants and beneficiaries." Pet. Br. at 35. Simply because Congress chose to subject different plans to civil enforcement under different provisions does not make the enforcement scheme inadequate. Furthermore, the fact that Section 4975 uses the term "disqualified person" instead of "party in interest" does not somehow suggest that Congress intended to create a private cause of action. While it is true that the definition of "disqualified person" is marginally more narrow than the term "party in interest," *compare* 26 U.S.C. § 4975(e)(2) *with* 29 U.S.C. § 1002(14), this difference does not show that a private cause of action is needed to protect plans. Rather, it reveals that Congress merely chose to treat differently those dealing with different types of plans.



transaction, it may be subject to a tax of up to 100% of the amount involved. Petitioners claim that these two provisions do not afford sufficient relief because they compensate the government and do not directly benefit the plan. *See* Pet. Br. at 33-34. To the contrary, the correction of a prohibited transaction must inure to the benefit of the plan. *See* I.R.C. § 4975(f)(5); ERISA § 502(i); 29 C.F.R. § 2560.502i-1 (1999); 26 C.F.R. § 53.4941(e)-(1)(c) (1999).[19] These two provisions reveal that when Congress intended to sanction nonfiduciary parties in interest, Congress did so explicitly.

Assuming, for the sake of argument, that ERISA creates a private cause of action, a nonfiduciary party in interest may not be able to settle a private dispute without negotiating a four-party agreement among itself, the plan, the Department of Labor, and the IRS.[20] Any settlement with the plan may not be binding on either the Department of Labor or the IRS. Conversely, any settlement reached with the Department of Labor or the IRS may not be binding upon the plan. We doubt Congress could have intended by the simple phrase, "to obtain other appropriate equitable relief," that nonfiduciary parties in

[19] The Department of Labor applies the principles of Section 4975 of the Code and its regulations in interpreting the term "correction" under Section 502(i) of ERISA. *See* 29 C.F.R. § 2560.502i-1(e) (1999).

[20] A four-party agreement may be required when the alleged prohibited transaction is with a tax-exempt plan. In the case of a prohibited transaction with a non-tax-exempt plan (to which Section 502(i) would apply), the parties may still have to negotiate a three-party agreement among the party in interest, the plan, and Secretary of Labor.

interest be placed in such an untenable position. This type of whipsaw effect will, in fact, make settlement with each of the parties so much more difficult that it will discourage any settlement with the IRS or the Department of Labor that would have benefitted the plan.

Petitioners' argument also ignores that in the vast majority of cases, a party in interest will likely correct the transaction when faced with possible civil penalties or taxes. At the outset, there is a legitimate business reason to do so. If a party in interest is facing a penalty or tax for the full amount involved in the transaction, it is in its interest to return the money to the plan rather than pay the penalty or tax to the government. The party in interest will receive in return the underlying securities or assets that it sold to the plan. As long as these assets retain value, the party in interest is better off unwinding the transaction rather than paying a penalty or tax in the same amount while receiving absolutely nothing in return. Also, because the party in interest generally has a continuing business relationship with the plan, it is to the party in interest's advantage to do as little harm to that relationship as possible. Thus, these penalties and taxes provide an economic deterrent against parties in interest engaging in transactions they suspect might be prohibited and an incentive to correct transactions when they later learn that the transactions were not exempt.

Even if these provisions did not always provide full relief, they represent the balance struck by Congress between protecting plans and having them operate efficiently. ERISA is not an insurance policy protecting plans against investment loss.[21] Rather, a fundamental objective of

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21 Petitioners are in essence asking the Court to grant plans free put options, with no expiration date, that they can exercise any time the value of the undulying assets decreases. By exercising the put through a private lawsuit against the party in interest, a plan could have its principal returned. On the other hand, if the value of the assets increases, the plan would participate in the upward movement, having the perfect "hedge" against losses.



ERISA is to ensure that plans have broad access to the capital markets while at the same time minimizing transaction costs for plans. It is therefore sensible that Congress intentionally would limit through the express language of the statute the kinds of relief available against nonfiduciary parties in interest who transact with plans.

In addition to the protection ERISA affords employee benefit plans, other regulators and self-regulatory organizations are available to assist in protecting benefit plans. Nonfiduciary parties in interest may include various entities such as banks, securities firms, broker-dealers, insurance companies, and accountants, and they are highly regulated entities. In addition to being subject to sanctions by the Department of Labor and the Department of the Treasury, they are regulated directly or indirectly by the Securities Exchange Commission, the National Association of Securities Dealers, the Board of Governors of the Federal Reserve System, the Board of Directors of the Federal Deposit Insurance Corporation, the New York Stock Exchange, other exchanges, and other federal and state governmental authorities. In sum, plans are protected by a variety of regulatory authorities armed with potent remedies. In these circumstances, creating a private cause of action is unnecessary.

### C. A Private Cause Of Action Would Undermine Congress's Aim To Hold Fiduciaries Accountable.

ERISA places on fiduciaries affirmative duties regarding the management of plans and their assets. In addition to those duties, ERISA prohibits fiduciaries from causing plans to enter into prohibited transactions, absent an exemption. Contrary to ERISA's goals, creating a private

cause of action against nonfiduciary parties in interest shifts the burden of complying with the prohibited transaction exemptions from fiduciaries to their counterparties.[22] These counterparties are often the least able to ascertain whether the transactions meet the conditions of any given exemption. A nonfiduciary party in interest relies, to a great extent, upon the judgment of the plan's fiduciary that the transaction meets the relevant exemption's conditions. Indeed, the fiduciary, as a condition precedent to entering into a transaction, often makes certain representations to the nonfiduciary party in interest that the transaction is exempt. That is the case because it is the plan and its fiduciaries that often have better access to the information necessary to determine whether a particular transaction is exempt.[23]

For example, one of the conditions of an exemption for qualified professional asset managers ("QPAM") is that the party in interest cannot be "related" to the QPAM.[24]

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22 As the Joint Explanatory Statement of the Committee of Conference explained:

> Under the labor provisions (title I), the fiduciary is the main focus of the prohibited transaction rules. This corresponds to the traditional focus of trust law and of civil enforcement of fiduciary responsibilities through the courts. On the other hand, the tax provisions (title II) focus on the disqualified person [party in interest].

H.R. CONF. REP. 93-1280, at 306 (1974), *reprinted in* 1974 U.S.C.C.A.N. at 5,038, 5,087.

23 Even if a party in interest were able to make some inquiries at the initiation of the transaction, continuing transactions, such as loans, may become prohibited during the terms of the loan if conditions for the plan change. A nonfiduciary party in interest is unlikely to be aware of the changed circumstances but could be the one held responsible under petitioners' theory of liability.

24 *See* Class Exemption for Plan Asset Transaction Determined by Independent Qualified Professional Asset Managers, 49 Fed. Reg. 9,494, 9,504, Section I(d) (1984) [hereinafter PTE 84-14].



Under the exemption, a QPAM is "related" to a party in interest if, among other things, the QPAM (or a person controlling, or controlled by, the QPAM) owns a 5% or more interest in the party in interest. *See* PTE 84-14, Section V(h), 49 Fed. Reg. at 9,506. It would be relatively less difficult for the QPAM than for the party in interest to determine whether the transaction meets the condition.[25] The same concerns arise in transactions with in-house asset managers.[26]

Another example of how the plan is better positioned to determine whether a transaction is exempt can be found in the conditions of the class exemption involving bank collective investment funds.[27] PTE 91-38 allows a bank collective investment fund to engage in certain transactions with a party in interest. For some transactions, the exemption is conditioned upon the interests of all plans maintained by the same employer or employee organization not exceeding 10% of the total assets in the bank collective investment fund. *See* PTE 91-38, Section I(a)(1)(A)(iii), 56 Fed. Reg. at 31,968. Surely the fiduciary stands in a better position than the nonfiduciary party in interest to determine whether those interests exceed 10%.

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25 Interestingly enough in this case, if National Investments Services of America, Inc. was a registered investment adviser, *see* J.A. 37, and the fiduciary that made the investment decision, and if less than 20% of it clients' assets under its management were derived from Ameritech, these transactions would have been exempt under the QPAM exemption. Only Ameritech and NISA, the two fiduciaries involved here, would know whether the transactions met those conditions; Salomon, the alleged nonfiduciary party in interest, would not. *See* PTE 84-14, Part I(e), V(c)(1), 49 Fed. Reg. at 9,504-05.

26 *See* Class Exemption for Plan Asset Transactions Determined by In-House Asset Manager, 61 Fed. Reg. 15,975 (1996).

27 *See* Amendment to Prohibited Transaction Exemption (PTE) 80-51 Involving Bank Collective Investment Funds, 56 Fed. Reg. 31,966 (1991) [hereinafter PTE 91-38].

Indeed, this case provides but one example of fiduciaries trying to shift their statutory obligations and liabilities. During the relevant time period, petitioner Ameritech sponsored and administered benefit plans funded through Ameritech Pension Trust ("APT"), and as such Ameritech was a fiduciary. *See* J.A. 285. ERISA allows a fiduciary to designate others to carry out fiduciary responsibilities. *See* ERISA § 405(c)(1). In so doing, a fiduciary may limit its liability. Ameritech appointed National Investments Services of America, Inc. ("NISA") to serve as the investment manager for some of APT's assets, *see* J.A. 343, and by all accounts Ameritech has designated NISA as a fiduciary, *see* J.A. 285-86, 311. NISA agreed that it would "not knowingly engage in any transaction prohibited by ERISA and other applicable law." J.A. 151.

Salomon's role stood in sharp contrast to that of NISA, because as the district court ruled, Salomon was not a fiduciary to the plan. *See* J.A. 294. Unlike NISA, a nonfiduciary party in interest, such as Salomon was alleged to be, accepts no fiduciary-like responsibility. As discussed above, ERISA's comprehensive enforcement scheme addresses nonfiduciary parties in interest's involvement in prohibited transactions through other mechanisms. Yet here, the two fiduciaries, Ameritech and NISA, are trying to shift retroactively to a nonfiduciary their responsibilities and liabilities as fiduciaries. Surely, the statute does not allow fiduciaries to foist such an obligation on a nonfiduciary whenever the plan suffers a loss. Despite these fiduciaries' role in the transactions at issue in this case, the plan is not pursuing relief from either one of them. As this case demonstrates, the proposed cause of action erodes the force of the fiduciary responsibility provisions that form the core of ERISA, ultimately to the detriment of employee benefit plans.



This shifting of responsibility from fiduciaries to nonfiduciaries will simply increase the costs associated with operating plans. The best way to minimize the administrative costs of protecting the plan is to place the burden of compliance on the party that is most able to avoid substantial additional costs. The complexity and fact-specific nature of complying with the conditions of exemptions point to fiduciaries as the "cheapest cost avoiders" and the ones best able to ensure compliance. But, under petitioners' proposal, nonfiduciary parties in interest—already working with limited information—would face increased exposure to liability.

The cause of action that petitioners advocate also shifts liability to nonfiduciary parties in interest that is disproportionate to their authority. On the one hand, the proposed cause of action would make the obligations and liabilities of fiduciaries and nonfiduciary parties of interest almost identical with respect to prohibited transactions. The nonfiduciary party in interest would effectively be a guarantor of the fiduciary's obligations to the plan. On the other hand, nonfiduciary parties in interest lack the fiduciary's discretion to administer the plans, they do not manage or dispose of assets, and they often lack the necessary information to determine if a given transaction is exempt or would violate Section 406. Recognizing this asymmetry or lack of mutuality, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." *Mertens*, 508 U.S. at 262.

## III. THE TEXT OF ERISA DOES NOT CREATE A PRIVATE CAUSE OF ACTION AGAINST NONFIDUCIARY PARTIES IN INTEREST.

Congress deliberately did not create a private cause of action against nonfiduciary parties in interest. The language of the relevant provisions in ERISA reveals that

no private cause of action against parties in interest exists. In resolving an issue of statutory construction, the Court must first "examine . . . the language of the governing statute." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav Bank*, 510 U.S. 86, 94 (1993). The Court must not only look to the particular statutory language, "but to the design of the statute as a whole and to its object and policy." *Crandon v. United Sates*, 494 U.S. 152, 158 (1989); *see also Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Upon reviewing the text of ERISA Sections 406 and 502 and considering ERISA's objectives, it is apparent that ERISA affords no private cause of action against nonfiduciaries such as parties in interest.

### A. Section 502(a)(3) Does Not Afford A Private Cause Of Action Against Parties Who Have Not Violated A Substantive Provision of ERISA.

Petitioners claim that Section 502(a)(3) of ERISA empowers them to sue a nonfiduciary for a fiduciary's violation of one of ERISA's substantive provisions. That interpretation of Section 502(a)(3) cannot be squared with the statute's language, nor would it further the legislative scheme Congress created. Section 502(a)(3) provides that a civil action may be brought

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3) (1994). Petitioners and their *amici* interpret the language "any act or practice" and "to obtain other appropriate equitable relief" as expanding the universe of individuals who may be sued by private plaintiffs to include nonfiduciaries. *See* Pet. Br. at 16; U.S. Br. at 15-18. This language, however, does not reach quite that far. As the Seventh Circuit explained, "Section [502(a)(3)] as a remedial statute only serves to provide a private cause of action for violations of ERISA; it does not expand the scope of liability under the Act." J.A. 349. Thus, a private cause of action is permitted against only those who have violated an obligation expressly placed upon them by the statute. *See Mertens*, 508 U.S. at 253 (holding that Section 502(a)(3) does not authorize appropriate equitable relief at large, but only to redress violations of the statute).



Indeed, a party should not be subject to private lawsuits "to obtain other appropriate equitable relief . . . to redress such violations" if the party itself did not violate a substantive provision of ERISA. Such an expansive reading would place no limits on who could be sued. For example, a fiduciary has a duty under Section 404(a)(1)(C) of ERISA to diversify the plan's holdings. If the fiduciary fails to diversify without good reason, petitioners' proposal would allow the plan (and the fiduciary) to sue a nonfiduciary to recover any benefits the nonfiduciary received from transacting with the plan.[28] This regime cannot be the balance Congress intended. If it were, transacting business with plans would be a risky proposition—a kind of Russian roulette that could severely limit plans' access to the markets.

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[28] There is literally no end to the scope of this proposed liability. Another example would be that under Section 404(a)(1)(D), the fiduciary has a duty to follow the documents and instruments governing the plan. What if, for example, the fiduciary purchases assets from a nonfiduciary that do not satisfy the plan's investment objectives? The nonfiduciary will have, and could have, no idea that ERISA is being violated. However, under the interpretation put forth by petitioners, if the transaction does not benefit the plan, the plan and the fiduciary could sue the unwitting nonfiduciary.

**B. A Party In Interest Cannot Violate Section 406 Because Section 406 Places Duties Only On Fiduciaries.**

Petitioners claim that Section 406 places an obligation on nonfiduciary parties in interest that can be enforced through a private lawsuit under Section 502(a)(3). *See* Pet. Br. at 19-21. Section 406, however, places no duty on nonfiduciary parties in interest. Rather, fiduciaries must avoid certain transactions, and only fiduciaries are capable of violating Section 406. Section 406 provides in relevant part:

> (1) *A fiduciary with respect to a plan shall not cause* the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—
>
> > (A) sale or exchange, or leasing, of any property between the plan and a party in interest; . . . [or]
> >
> > (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan.

29 U.S.C. § 1106(a)(1) (1994) (emphasis added). This provision states that a *fiduciary* shall not cause the plan to enter into certain transactions. It *does not* state that a party in interest shall not enter into certain transactions.[29]

[29] The legislative history reveals that Congress purposefully did not create the kind of private cause of action petitioners now seek. The Senate version of ERISA explicitly created liability against a party in interest for entering into a prohibited transaction. *See* S. 1179, 93d Cong., 1st Sess., at 176-77 (1973). The House Bill, on the other hand, limited liability simply to fiduciaries. *See generally* H.R. 2, 93d Cong., 2d Sess. (1974). The Conference Committee staff recommended that the conferees adopt the approach taken by the House bill and "not provide civil liability for parties-in-interest." STAFF OF CONF. COMM., 93d Cong., 2d Sess., SUMM. DIFFERENCES BETWEEN SEN. VERSION & HOUSE VERSION OF H.R. 2 —TO PROVIDE FOR PENSION REFORM (Comm. Print. 1974), *reprinted in* LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974, Vol. 3, at 5249, 5259 (1976). Accordingly, the "labor provisions . . . provide general standards of conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' which plan fiduciaries are not to engage in." H.R. CONF. REP. NO. 93-1280, at 294 (1974), *reprinted in* 1974 U.S.C.C.A.N. 5,038, 5,076.



Only a fiduciary can be held liable for violating Section 406. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 888-89 (1996) (holding that plaintiff must prove that fiduciary caused transaction in violation of Section 406 to successfully bring private action under Section 502).

Petitioners argue that Section 406 places duties, not only on fiduciaries, but also on nonfiduciariy parties in interest, because the provision is entitled "Prohibited Transactions." *See* Pet. Br. at 21. This reading ignores the text and the statute's overall structure. The provision is found in the subchapter of ERISA entitled "Fiduciary Responsibilities." It is the *fiduciary's responsibility* not to enter into certain prohibited transactions. Simply because a transaction involves multiple parties does not mean that ERISA provides a private cause of action against all the parties to that transaction.

Petitioners also argue that because the provision mentions "parties in interest" by name, it shows that parties in interest can independently violate the section. *See* Pet. Br. at 21-23. However, as the Seventh Circuit points out, "[t]he mere fact that [Section 406] mentions 'parties in interest' when it describes the transactions that fiduciaries must avoid does not mean that parties in interest are liable when a fiduciary does engage in a prohibited transaction." J.A. 349. Indeed, the term party in interest is added to the statutory text to describe the kinds of transactions that a fiduciary "shall not cause the plan to enter into." Its inclusion is merely a means to explain the fiduciary's obligations with respect to entering into certain transactions.

If Congress had intended to place a duty on parties in interest under Section 406, it presumably could have said a fiduciary shall not cause a plan to engage in certain transactions *and neither shall a party in interest* participate in such transactions.

Furthermore, Section 408, which provides for exemptions from the operation of Section 406, reveals that Congress used the term party in interest for descriptive purposes in Section 406—not to place obligations on nonfiduciary parties in interest. *See* 29 U.S.C. § 1108 (1994). Nowhere does this provision exempt parties in interest from the reach of Section 406. Rather, it allows the Secretary of Labor to exempt "any *fiduciary* or transaction . . . from all or part of the restrictions imposed by sections [406 and 407]." 29 U.S.C. § 1108(a) (1994) (emphasis added). Had Congress intended that parties in interest be held liable under Section 406, it would have included parties in interest in the universe of entities protected by the exemptions. If the Court interprets Section 406 as petitioners argue, a nonfiduciary party in interest could be sued for the same transaction that the secretary of Labor has exempted for a fiduciary. Such an interpretation would be nonsensical.

### C. This Court Has Already Expressed Its Reservations About Finding A Private Cause Of Action Under ERISA Against Nonfiduciary Parties In Interest.

This Court has twice been reluctant to find that a private cause of action exists against nonfiduciaries (including parties in interest). In *Lockheed Corp v. Spink*, the Court was faced with a private cause of action under Section 502(a)(2) & (3) for alleged violations of Section 406(a). 517 U.S. 882 (1996). The question before the Court was whether the transaction was a "prohibited transaction." The Court ruled that a plaintiff must first



"show that a *fiduciary* caused the plan to engage in the allegedly unlawful transaction" to sustain an action under Section 406(a). *Id.* at 888 (emphasis added). Although the Court did not go on to decide whether a private party could sue the nonfiduciary party in interest for entering into a prohibited transaction, it identified the *fiduciary's* breach of *its* duty as the key element for a violation of Section 406.

The Court in *Mertens v. Hewitt Assocs.* considered whether a private cause of action exists under ERISA for violations by nonfiduciaries. 508 U.S. 248 (1993). In *Mertens*, plaintiffs sued the nonfiduciary actuary of a retirement plan under Section 502(a)(3), claiming that the actuary knowingly participated in the fiduciary's breach of his fiduciary duties. *See id.* at 251. Although the narrow issue before the Court was whether monetary damages were available under Section 502(a)(3), the Court considered whether a private cause of action exists at all under Section 502(a) against nonfiduciaries. Expressing its doubt, the Court acknowledged that the provision "does not, after all, authorize 'appropriate equitable relief' at large but only 'appropriate equitable relief' for the purpose of 'redress[ing any] violations or . . . enforc[ing] any provisions' of ERISA or an ERISA plan." *Id.* at 253. The Court both limited the relief available under Section 502 to relief for violations of ERISA's substantive provisions and expressed its doubt as to whether a private plaintiff could sue a nonfiduciary. *See id.* at 253-55.

* * * * *

Congress crafted ERISA with mechanisms that protect employee benefit plans while being cognizant of the costs of that protection. Petitioners have argued that this protection is insufficient and that a private cause of action is needed to protect plans adequately. As shown above, there are no compelling reasons for this Court to take

that step to "attempt to adjust the balance between those competing goals [—benefiting employees and containing cost—] that the text adopted by Congress has struck." Mertens, 508 U.S. at 263.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

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IN THE

# Supreme Court of the United States

HARRIS TRUST AND SAVINGS BANK, not individually but solely as Trustee for the Ameritech Pension Trust, and AMERITECH CORPORATION,

*Petitioners*,

v.

SALOMON SMITH BARNEY INC. and SALOMON BROTHERS REALTY CORP.,

*Respondents*.

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

## BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURERS AND WILLIAM A. FICKLING, JR., *et al.*, AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Whether private parties may obtain equitable relief against nonfiduciary parties in interest who participate in transactions described in ERISA § 406(a), 29 U.S.C. § 1106(a).

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**BRIEF OF**
**THE AMERICAN COUNCIL OF LIFE INSURERS**
**AND WILLIAM A. FICKLING, JR., *et al.*,**
**AS *AMICI CURIAE***
**IN SUPPORT OF RESPONDENTS**

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*Amici curiae* the American Council of Life Insurers ("ACLI"); and William A. Fickling, Jr.; Neva L. Fickling; William A. Fickling; Claudia F. Fickling; Jane Dru Fickling; Katherine M. Wright; Katherine Darden Wright; Virginia M. Rabun; W&J Capital Company, Ltd.; J&R Capital Company, Ltd.; and Nationsbank of Georgia, N.A., as successor trustee under certain Fickling private trusts (collectively the "Fickling *amici*"), respectfully submit this brief in support of the respondents.[1]

## INTEREST OF AMICI CURIAE

1. *Amicus* ACLI, based in Washington D.C., is the largest trade association in the United States representing the life insurance industry. Its members consist of 435 legal reserve life insurance companies. Together, its members account for over 73.2% of the life insurance business, as well as 46.2% of the disability and 82% of the pension insurance underwritten by life insurance companies in the country.

The ACLI's members often operate as service providers to employee benefit plans, performing many nonfiduciary functions, including custodial and recordkeeping services, and therefore fall within the statutory definition of "party in interest," ERISA § 3(14), 29 U.S.C. § 1002(14). As service

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[1] Letters of consent from all parties to the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief.

providers, the ACLI's members would be subject to equitable restitution claims if suits against nonfiduciary parties in interest were permitted under ERISA § 502(a), 29 U.S.C. § 1132(a). Accordingly, the ACLI and its members have a vital interest in assuring that ERISA is interpreted consistent with its text and legislative history.

2. The Fickling *amici* are defendants in a suit in which the Secretary of Labor ("Secretary") seeks equitable relief from them on the theory that they are parties in interest who allegedly participated in a "prohibited transaction" under ERISA § 406(a)(1)(A), 29 U.S.C. § 1106(a)(1)(A). The Secretary of Labor alleges that *amici* violated Section § 406(a)(1)(A) when they sold Charter Medical Corporation stock to Charter's Employee Stock Ownership Plan in February, 1990.

The district court initially granted summary judgment in favor of the Fickling *amici* on the ground that ERISA does not authorize the Secretary of Labor to sue non-fiduciary "parties in interest" for their participation, knowing or otherwise, in a prohibited transaction. The Eleventh Circuit reversed, concluding that the Fickling *amici* may be held liable under ERISA if they are found to be "parties in interest." *See Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1419-22 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1030 (1999).[2] The Seventh Circuit, in the decision below, expressly disagreed with the Eleventh Circuit's decision in *Herman*. Because the Secretary's action remains pending against the

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[2] The Eleventh Circuit decision considered ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), which governs actions brought by the Secretary of Labor, while the present case was brought by private litigants under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). This Court has recognized that the two provisions must be interpreted consistently. *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 260 (1993); *see also, e.g., Reich v. Compton*, 57 F.3d 270, 284 (3d Cir. 1995).



Fickling *amici* in federal district court, they have a vital interest in the outcome of this case.

## STATEMENT

1. In the late 1980's respondents Salomon Smith Barney Inc. and Salomon Brothers Realty Corp. (collectively "Salomon") provided broker-dealer services to Ameritech Pension Trust ("APT" or "Trust"), which holds assets for Ameritech Corporation's employee pension plans. National Investment Services of America, Inc. ("NISA") was the investment manager to APT and, as such, was responsible for investment decisions concerning certain of APT's assets. Pet. App. 2a.

From 1987 to 1989 Salomon arranged financing for two motel chains, Motels of America, Inc. and Best Inns, Inc. In four separate transactions, those companies sold mortgage notes secured by certain motel properties to Salomon, which, in turn, sold the notes to institutional investors. As consideration for its services, Salomon received fees based on a percentage of any "net cash flow" generated by the motel properties upon maturity of the associated notes, or upon sale of the properties. Pet. App. 2a.

Salomon subsequently offered to sell its participation interest in the motel properties to APT and, after extensive negotiations among Salomon, NISA, and Ameritech, APT purchased Salomon's participation interests in the four groups of motels for approximately $20 million. In the early 1990's, however, the nationwide market for hotel and motel real property collapsed and the issuers of the participation interests purchased by APT went into bankruptcy. APT suffered a considerable loss on its investment. Pet. App. 2a.

2. APT's newly appointed trustee, petitioner Harris Trust and Savings Bank, sued Salomon in 1992, alleging claims under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA"), the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961, *et seq.*, and Illinois statutory and common law. To the extent pertinent here, the ERISA claim alleged that Salomon, a "party in interest" with respect to APT, participated in a

"prohibited transaction" under ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), when it sold its participation interest in the motel groups to APT.

Salomon moved for summary judgment on the ERISA claim, asserting that ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), authorizes a private cause of action only against fiduciaries who caused a Section 406(a) prohibited transaction. The district court denied summary judgment, finding that nonfiduciary parties in interest may be liable under ERISA for participating in prohibited transactions. Salomon moved for reconsideration or, in the alternative, certification for interlocutory appeal. Pet. App. 3a. The district court declined to reconsider its decision, but later certified for interlocutory review, under 28 U.S.C. § 1292(b), the question whether ERISA authorizes an action "against a nonfiduciary party in interest who participated in a transaction with a pension plan prohibited in 29 U.S.C. § 1106(a)." Pet. App. 63a.

3. The court of appeals accepted the appeal and reversed. Pet. App. 1a-13a. After reviewing the statutory language, legislative history, and this Court's cases, the Seventh Circuit concluded that ERISA § 502(a), 29 U.S.C. § 1132(a), does not provide for a cause of action by private litigants or the Secretary against nonfiduciary parties in interest.

The court of appeals first noted that ERISA § 406, 29 U.S.C. § 1106—which precludes fiduciaries from permitting a plan to engage in certain transactions with "parties in interest"—governs only the conduct of fiduciaries. That focus, the court believed, indicates that only a fiduciary can violate Section 406. Pet. App. 7a. In that regard, the court observed that Section 406 is contained within Title I, entitled "Fiduciary Responsibilities." *Ibid.* The court also noted that ERISA § 409, 29 U.S.C. § 1109, makes the fiduciary—and only the fiduciary—liable for breaches of the duties described in Title I of the statute. Pet. App. 7a. Because Section 502(a)(3), 29 U.S.C. § 1132(a)(3), provides a private cause of action only to enjoin or redress "violation[s]" of ERISA, the court concluded that Section 502(a) may not be invoked against parties who are not liable under Section 409. Pet. App. 7a.



The court of appeals further concluded that this Court's opinion in *Mertens v. Hewitt Assocs.*, 508 U.S. 248 (1993), supported the conclusion that nonfiduciaries cannot be liable for participating in a prohibited transaction under Section 406. Pet. App. 8a. In *Mertens*, this Court reasoned that because ERISA did not explicitly provide a cause of action against nonfiduciaries for participating in a fiduciary breach under ERISA § 404, 29 U.S.C. § 1104, no such cause of action exists. 508 U.S. at 254. The Seventh Circuit held that the same logic applies to Section 406 since Section 406 simply describes another variety of fiduciary breach. Pet. App. 7a. While the court of appeals recognized that *Mertens* had indicated in dictum that parties in interest might be treated different from other nonfiduciaries, so as to subject them to equitable relief in certain circumstances, the court concluded that subsequent pronouncements from this Court cast doubt on that *Mertens* dictum. *Id.* at 11a.

Finally, the court of appeals emphasized that, in enacting ERISA, Congress developed a detailed enforcement procedure under which civil penalties are the sole enforcement mechanism for nonfiduciary parties in interest who participate in prohibited transactions with pension plans. Pet. App. 9a. Indeed, the court noted that the legislative history of ERISA demonstrates that Congress deliberately chose *not* to give enforcement authority against nonfiduciaries to private parties or to the Secretary of Labor, since Congress specifically considered imposing civil liability on parties in interest for participating in prohibited transactions, then elected not to do so. *Id.* at 11a-12a.

## SUMMARY OF ARGUMENT

The plain language of ERISA § 406(a), 29 U.S.C. § 1106(a), states that a "fiduciary * * * shall not cause" a plan to engage in certain transactions with parties in interest if the fiduciary "knows or should know" that the transaction is one—involving the exchange, sale, or transfer of plan assets—that Section 406 specifically prohibits. Section 406 imposes no corresponding duties on parties in interest to refrain from participating in any of the described prohibited

transactions. Because the statutory burden is placed only on fiduciaries, it naturally follows that only fiduciaries can violate Section 406, especially since parties in interest lack the authority to cause an employee benefit plan to enter into any of the transactions prohibited by Section 406. By statutory definition, only fiduciaries can exercise discretionary authority regarding the disposition of plan assets. ERISA § 3(21)(A), 29 U.S.C. § 1002(21)(A).

The conclusion that only a fiduciary can violate Section 406 is consistent with the fact that Section 406 is contained in Part 4 of Title I of ERISA, which generally regulates fiduciary duties. Because Section 502(a)(3) only provides a cause of action for acts or practices that violate Title I of ERISA, and since only a fiduciary can violate Section 406, nonfiduciary parties in interest are not parties that may be sued under Section 502(a)(3).

Congress intended for the Secretary of the Treasury, through the assessment of excise taxes under 26 U.S.C. § 4975, to have exclusive enforcement authority over parties in interest with respect to prohibited transactions involving tax-qualified pension plans. Congress also invested the Secretary of Labor with authority to seek civil penalties from parties in interest who participate in prohibited transactions with other employee benefit plans. ERISA § 502(i), 29 U.S.C. § 1102(i). Congress did not otherwise intend to subject nonfiduciary parties in interest to suits seeking equitable relief under Section 502(a). Instead, Congress intended to make fiduciaries liable for causing prohibited transactions through the enforcement mechanisms of Title I of ERISA, including Section 502(a)(3). Indeed, ERISA's legislative history clearly shows that Congress rejected proposed legislation that expressly provided a cause of action against nonfiduciary parties in interest participating in a prohibited transaction to make good any losses sustained by an employee benefit plan, and to pay the plan any profits realized.

To subject nonfiduciary parties in interest to liability under Section 502(a)(3) would also be contrary to the rationale of *Mertens*, in which this Court reasoned that nonfiduciaries



cannot be liable under Section 502(a) for knowingly participating in a fiduciary breach because ERISA does not expressly provide for such liability. *Mertens* also effectively precludes any argument that Section 406 prohibits *transactions* rather than *fiduciary conduct*: since nonfiduciaries are not liable for participating in transactions that result in liability for fiduciaries under ERISA § 404, 29 U.S.C. § 1104 (fiduciary standard of care), it follows that they cannot be liable for participating in transactions prohibited by Section 406, which merely describes specific varieties of breaches of fiduciary duties.

ERISA's comprehensive enforcement provisions provide no textual support for the proposition that nonfiduciary parties in interest may be subject to suit under Section 502(a)(3). Petitioners' claim that Section 502(a)(3) does not expressly limit the parties who may be sued begs the question. ERISA does not affirmatively authorize such an action, and this Court has repeatedly emphasized its unwillingness to infer causes of action in the ERISA context. *See Mertens*, 508 U.S. at 254. Moreover, the fact that ERISA § 502(a)(6), 29 U.S.C. § 1132(a)(6), provides for an express cause of action by the Secretary of Labor against parties in interest limited to recovering civil penalties commands the conclusion that the absence of an express provision was not simply legislative oversight, but instead "strong evidence that Congress did not intend to incorporate other remedies that it * * * [did not] incorporate expressly." *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). And the fact that the Secretary of Labor's express authority to impose civil penalties against parties interest under Title I of ERISA is restricted to prohibited transactions involving *welfare benefit plans*, ERISA § 502(i), 29 U.S.C. § 1102(i), with the Secretary of the Treasury having parallel authority under 26 U.S.C. § 4975 to impose penalties against parties in interest in prohibited transactions involving *pension plans*, certainly eliminates any credible claim that Section 502(a)(3) reaches parties in interest involved in a prohibited transaction with a pension plan.

Petitioners strain to rescue their position by construing the phrase "other person" in Section 502(l), 29 U.S.C. § 1132(l), as an acknowledgment of party-in-interest liability under Section 502(a). But this Court in *Mertens* expressly rejected a similar argument and suggested that the term "other person" in Section 502(l) refers to a co-fiduciary, and not to the same fiduciary party. *See* 508 U.S. at 260-61.

Finally, petitioners and their *amici* fare no better with their reliance on Section 3003, 29 U.S.C. § 1203, which requires the Secretary of Labor to report to the Secretary of the Treasury any information that a "party-in-interest * * * is violating" Section 406. That provision proves very little because fiduciaries may be parties in interest. Indeed, by requiring only that the Secretary of the Treasury be notified with no comparable obligation on the Secretary of the Treasury to notify the Secretary of Labor, Congress once again made clear its intent to leave with the Secretary of the Treasury the sole enforcement responsibility against parties in interest.

## ARGUMENT

### NONFIDUCIARY PARTIES IN INTEREST ARE NOT SUBJECT TO SUIT UNDER SECTION 502(a)(3) OF ERISA.

ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3), allows participants, beneficiaries, or fiduciaries to seek "appropriate equitable relief" to redress any act or practice that "violates" Title I of ERISA. ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5), in parallel language, gives the Secretary of Labor the right to seek equitable relief to "redress" "violation[s]" of Title I of ERISA. Neither provision, however, authorizes a suit that purports to seek equitable relief from parties who have not "violated" Title I of ERISA. Nonfiduciary parties in interest who participate in the transactions described in ERISA § 406(a), 29 U.S.C. § 1106(a), do not thereby "violate" any provision of Title I. As demonstrated below, while Section 406(a) enjoins fiduciaries from causing an employment benefit plan to enter into certain transactions



with parties in interest, it imposes no comparable duty on parties in interest to avoid participating in such a transaction. The statutory burden is placed entirely on the fiduciary. Accordingly, parties in interest are not subject to suit under Section 502(a)(3) or (a)(5).

#### A. Section 406 Expressly Prohibits Only Fiduciaries From Causing A Plan To Enter Into A Prohibited Transaction.

Contained in Title I of ERISA, which is entitled "Fiduciary Responsibilities," ERISA § 406(a)(1), 29 U.S.C. § 1106(a)(1), states:

> Except as provided in section 1108 of this title:
>
> (1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect —
>
> (A) sale or exchange, or leasing, of any property between the plan and a party in interest;
>
> (B) lending of money or other extension of credit between the plan and a party in interest;
>
> (C) furnishing of goods, services, or facilities between the plan and a party in interest;
>
> (D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or
>
> (E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

Section 406 plainly provides that a "fiduciary * * * shall not cause" a plan to engage in certain transactions with parties in interest. While a party in interest may be a participant, only a fiduciary can "cause" a plan to enter into a "prohibited transaction" because only a "fiduciary" has discretionary authority over the assets of a plan. 29 U.S.C. § 1002(21)(A). A nonfiduciary party in interest obviously has no such au-

thority, and no provision of ERISA explicitly imposes any duty on parties in interest to avoid participating (knowingly or unknowingly) in such a transaction. Thus, the exclusive responsibility to avoid a prohibited transaction is placed on the shoulders of the fiduciary. And that is where civil liability for violating Section 406 rests. As the Court put the point in *Mertens*, ERISA "allocates liability for plan-related misdeeds in reasonable proportion to respective actors' power to control and prevent the misdeeds." 508 U.S. at 262. In the case of prohibited transactions under Section 406(a), that actor is the fiduciary, not the party in interest.

Any other conclusion would not be in harmony with the text of Section 406. For example, the statute does not bar all transactions between an employee benefit plan and a party in interest, but only those transactions that a fiduciary "knows or should know" are prohibited. Making the very existence of a prohibited transaction—that is, a violation of Section 406—contingent upon the mental state of the fiduciary is wholly inconsistent with making participation in that transaction by the party in interest a violation of the statute. The party in interest's liability would turn not on its own mental state—*i.e.*, whether it knew or should have known that the transaction was one prohibited by ERISA—but on what the *fiduciary* knew or should have known. Indeed, the party in interest may have no way to gauge the state of mind of the fiduciary, and thus be unable to judge whether the contemplated transaction is one prohibited by ERISA.[3]

The question whether Sections 502(a)(3) and (a)(5) authorize a suit against nonfiduciary parties in interest who participate in Section 406 transactions is virtually identical to the question whether Section 502(a) authorizes equitable relief against nonfiduciaries who participate in a fiduciary breach. In *Mertens*, this Court rejected the proposition that nonfiduciaries are liable for knowing participation in a fiduciary breach in the absence of an express provision imposing such a duty, even though such liability was well established under the common law. 508 U.S. at 254. The *Mertens* Court noted only "*some* common law nonfiduciaries are made subject to [a duty not to assist in a fiduciary's breach], namely those who fall within ERISA's artificial definition of fiduciary." 508 U.S. at 255 n.5 (marks and emphasis omitted). As this Court subsequently explained, "[w]hile plaintiffs had a remedy against nonfiduciaries at common law, that was because nonfiduciaries had a duty to the beneficiaries not to assist in the fiduciary's breach. No comparable duty [is] set forth in ERISA." *Central Bank of Denver, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 175 (1994) (marks and internal citations to *Mertens* omitted).[4]

That reasoning applies with equal force to Section 406: there can be no cause of action against nonfiduciary parties in interest for the simple reason that ERISA does not impose a *duty* on such entities. If, as *Mertens* and *Central Bank* indicate, there is no nonfiduciary liability even for knowing

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[3] If, as petitioners argue, a nonfiduciary party in interest could somehow "violate" Section 406, the statute does not indicate what state of mind would be necessary to establish such a violation. In light of ERISA's comprehensive enforcement scheme, this omission is compelling evidence that Congress did not believe nonfiduciary parties in interest could "violate" Section 406.

[4] Dismissing this Court's discussion of nonfiduciary liability in *Mertens* as mere dictum that may be reconsidered in a future case, the United States, as *amicus curiae*, argues that Sections 502(a)(3) and (a)(5) provide a cause of action against nonfiduciaries for knowing participation in a fiduciary breach. (U.S. Br. 24 & n.11.) This Court, however, expressly relied upon its analysis of nonfiduciary liability in *Mertens*—treating it as an established rule of law—in framing what is indisputably the holding of *Central Bank*. 511 U.S. at 175. Indeed, this Court rebuffed the United States' attempt to reargue *Mertens* by turning down the Secretary of Labor's petition for certiorari in *Reich v. Continental Casualty Co.*, 513 U.S. 1152 (1995).

participation in a fiduciary breach, it necessarily follows that there can be no nonfiduciary party-in-interest liability under Section 502(a) for participating in a prohibited transaction. A prohibited transaction under ERISA is no more than a statutorily defined fiduciary breach, and Section 406, like Section 404 (which was at issue in *Mertens*), places the burden of avoiding the fiduciary breach on the fiduciary, where that burden traditionally has fallen.

In an effort to bring nonfiduciaries within the scope of Section 502(a)(3), petitioners and their *amici* also contend that Section 406 generally prohibits *transactions* rather than mere fiduciary *conduct*. That argument is also foreclosed by the reasoning in *Mertens*.[5] A nonfiduciary's participation in a prohibited transaction is no more a "violation" of ERISA Title I than is a nonfiduciary's participation in any other breach of fiduciary duty. In either case, ERISA Title I (and specifically Sections 404 and 406) expressly prohibits the *fiduciary* from engaging in certain conduct, but does not purport to proscribe the conduct of any other party. Since *Mertens* holds that Section 502(a) provides no cause of action against nonfiduciaries (including parties in interest) who knowingly participate in a transaction that amounts to a violation of Section 404 by the fiduciary, it necessarily follows

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5 Petitioners assert that, unlike prohibited transactions under Section 406, there are no "necessary counter-parties" to fiduciary violations under Sections 405 and 409, which were at issue in *Mertens*. (Pet. Br. 46.) But the discussion of nonfiduciary liability in *Mertens* was not contingent upon the presence or absence of "necessary counter-parties" to a fiduciary breach, but rather upon the fact that the plain language of the statute imposed liability on fiduciaries alone. *See Mertens*, 508 U.S. at 253-54 ("no provision explicitly requires [nonfiduciaries] to avoid participation (knowing or unknowing) in a fiduciary's breach of fiduciary duty"). Moreover, the fact that a prohibited transaction may occur entirely among fiduciaries contradicts petitioners' assertion that nonfiduciaries are "necessary counter-parties" to Section 406 transactions.



that nonfiduciaries cannot be liable under Title I for participating in a transaction that amounts to a violation—by the *fiduciary* alone—of Section 406.

To be sure, *Mertens* observed in passing that "[p]rofessional service providers * * * must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406," 508 U.S. at 262, but that comment did not express the considered judgment of this Court. Indeed, although the Court (in *Central Bank*) has expressly reaffirmed its observation that nonfiduciaries are not liable for participating in a fiduciary breach, this Court has taken pains since its decision in *Mertens* to make clear that *Mertens* did *not* resolve the party-in-interest issue. As this Court has cautioned, those statements in *Mertens* "were in any event dicta, since Section 406(a) was not at issue." *Lockheed Corp. v. Spink*, 517 U.S. 882, 889 n.3 (1996).[6] Indeed, the most that this Court was willing to say in *Lockheed* for the theory that nonfiduciary parties in interest can be liable under ERISA is that such theory is "not necessarily wrong" (*ibid.*)—not exactly a ringing endorsement. As the Seventh Circuit correctly observed, "not necessarily wrong" is quite a distance from being "right." Pet. App. 11a.

Petitioners suggest that even if the Court does not revisit the central premise of *Mertens* (as reaffirmed in *Central Bank*) that nonfiduciaries are generally not liable for knowing participation in a fiduciary breach, nonfiduciary parties in

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6 In any event, the Court's comments in *Mertens* were made in the context of "[p]rofessional service providers" who "cross the line from advisor to fiduciary." 508 U.S. at 262. Congress imposed fiduciary duties on certain professional service providers—those who provide paid investment advice to a plan, 29 U.S.C. § 1002(21)—but not on other service providers. *See* 29 U.S.C. § 1002(14)(B). Those *fiduciary* parties in interest may be subject to suit under ERISA for disgorgement of assets or profits obtained through a prohibited transaction. 29 U.S.C. § 409(a)

interest should be subject to equitable remedies even if they cannot violate Section 406. They suggest that since Section 502(a)(3) does not expressly limit the persons who may be sued for a violation of Title I, any violation by a *fiduciary* would open the door to a suit in equity under Section 502(a)(3) against "*any* party that would be unjustly enriched by retaining possession of assets." (Pet. Br. 30.) Invoking the common law of trusts, petitioners argue that the Court could impose a constructive trust on plan assets transferred to any third party except a bona fide purchaser — that is, except to a person who gave value for the assets without actual or constructive knowledge of the circumstances giving rise to the constructive trust.

Petitioners' argument proceeds from fundamentally mistaken premises. The mention of "equitable remedies" in Section 502(a)(3) does not, as petitioners assume, incorporate wholesale the common law of trusts into ERISA. This Court has repeatedly emphasized that Section 502(a)(3) does not authorize equitable relief *at large*, but only "appropriate" equitable relief for the limited purpose of "redressing" *violations* or enforcing provisions of Title I. *See Peacock v. Thomas*, 516 U.S. 349, 353 (1996), citing *Mertens*, 508 U.S. at 253. *Cf. Central Bank*, 511 U.S. at 175 (noting that ERISA does not incorporate common law remedies against nonfiduciaries for knowing participation in fiduciary breach). The law does not ordinarily require one to "redress" a wrong for which one bears no legal responsibility. Consistent with this principle, this Court has repeatedly declined to authorize equitable remedies under Section 502(a)(3) against nonfiduciaries who have not directly violated Title I. *See Lockheed Corp.*, 517 U.S. at 888-89; *Peacock*, 516 U.S. at 353; *Mertens*, 508 U.S. at 253.

Moreover, the imposition of a constructive trust on plan assets transferred to a nonfiduciary party in interest in the course of a prohibited transaction would, in effect, make service providers liable regardless of their *actual* knowledge of a prohibited transaction. This Court observed in *Mertens* that "exposure to that sort of liability would impose high insurance costs upon persons who regularly deal with and offer advise to ERISA plans, and hence upon ERISA plans themselves." 508 U.S. at 262.



Indeed, imposing liability on nonfiduciary parties in interest without regard to their independent fault would have the undesirable effect of discouraging third parties from providing critical services to pension plans. "[E]xtending the threat of liability over the heads of those who only lend professional services to a plan without exercising any control over, or transacting with, plan assets will deter such individuals from helping fiduciaries navigate the intricate financial and legal thicket of ERISA." *Reich v. Rowe*, 20 F.3d 25, 32 (1st Cir. 1994).

Petitioners dismiss that concern by pointing out that service providers will face liability only if they engage in prohibited transactions, rather than "merely advising" a plan—in other words, only if they accept payment for their services. (Pet. Br. 39 n.21.) That rejoinder, however, does not answer the fundamental problem created by petitioners' interpretation of ERISA—*i.e.*, that fiduciaries will find it difficult to obtain the professional advice that Congress clearly intended they should have in order properly to discharge their duties to the plan, since lawyers, actuaries, and other professional advisors would be subject to suit whenever the Secretary of Labor, a beneficiary or participant, or, as in the case here, a subsequent fiduciary claimed that the provider charged "too much" for their services. In fact, if this case is any indication, professional service providers could be subjected to liability even if the fiduciary, who *knowingly* caused the transaction in the first place, has evaded liability altogether. That result scarcely accords with Congress' focus on the *fiduciary* as the party best situated to ensure against prohibited transactions. Indeed, Congress made clear that fiduciaries may not be relieved from liability for breach of any duty or obligation under Title I of ERISA. *See* 29 U.S.C. § 1110(a).

### B. ERISA's Structure and History Establish That Congress Did Not Intend To Authorize Equitable Relief Against Nonfiduciary Parties In Interest.

ERISA's comprehensive, integrated enforcement provisions give the Secretary of the Treasury (through the IRS) exclusive enforcement authority over nonfiduciary parties in interest who engage in Section 406 transactions with respect to tax-qualified pension plans. This enforcement authority was included in Title II of ERISA and codified in Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975. Enforcement authority with respect to fiduciaries, by contrast, was included in the labor provisions of ERISA's Title I. *See* 29 U.S.C. § 1132.[7] While the Secretary of Labor may assess civil penalties against parties in interest under ERISA § 502(i), 29 U.S.C. § 1102(i), neither the Secretary of Labor nor any private party is authorized to sue nonfiduciary parties in interest for equitable relief under the parallel "catch all" provisions of Section 502(a)(3) or Section 502(a)(5). By attempting to bring the regulation of nonfiduciary parties in interest under the general umbrella of Title I, petitioners ignore the carefully divided enforcement scheme that Congress created.

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[7] The fiduciary focus of Title I of ERISA is confirmed by Congress' decision to prescribe a statute of limitations for fiduciaries, but not for parties in interest. By its terms, ERISA § 413, 29 U.S.C. § 1113, imposes a three-year statute of limitations on actions to redress breaches of fiduciary duty under Title I where the plaintiff had actual knowledge of the violation of Section 406, or at most six years from the date of the last action or omission of the fiduciary that caused the breach, but does not address claims against nonfiduciary parties in interest. If Section 502(a)(3) permits suits against parties in interest, such parties would have an open-ended potential liability, while fiduciaries—to whom the statute assigns the responsibility to prevent prohibited transactions—could escape liability after as little as three years. It is doubtful that Congress would have established such an anomalous structure.



1. Section 4975 of the Internal Revenue Code imposes a two-tiered excise tax on any "disqualified person who participates in [a] prohibited transaction [with a pension plan] (other than a fiduciary acting only as such)," and defines "disqualified person" in terms almost identical to ERISA's definition of "party in interest." *Compare* 26 U.S.C. § 4975(a) and (e)(2) *with* 29 U.S.C. § 1002(14). Under this system, the IRS is authorized to levy an excise tax of 5 percent per year, which is then increased to 100 percent if the prohibited transaction is not corrected. 26 U.S.C. § 4975(a) and (b) (1994). The 100 percent tax levy gives the IRS a powerful incentive to encourage parties in interest to secure a correction of a prohibited transaction, and of course this ultimately benefits plans and participants which receive the correction.

The fact that the IRS may levy excise taxes against certain parties in interest who participate in prohibited transactions does not imply that Section 406 itself imposes a "duty" on nonfiduciaries to avoid such transactions. First, the taxes imposed by Section 4975 of the Internal Revenue Code apply only to "disqualified persons," a term that excludes certain individuals classified as "parties in interest" for purposes of Section 406. Accordingly, the assessment of taxes against disqualified persons under Section 4975 cannot, as petitioners suggest, imply that Section 406 imposes a general duty on all parties in interest to avoid prohibited transactions.

Second, Congress obviously believed that the prospect of incurring a tax penalty would be sufficient to deter nonfiduciary parties in interest from knowingly engaging in prohibited transactions. Congress considered and rejected imposing direct responsibility on nonfiduciary parties in interest for losses sustained by plans, or to pay over to plans any profits they realized on the prohibited transaction. *See infra.* Congress left such liability on fiduciaries who cause the prohibited transactions to occur. 29 U.S.C. § 409(a). In any event, even if the IRS's "right" to impose tax penalties on certain

nonfiduciary parties in interest who engage in prohibited transactions could be said to generate a corresponding "duty" to avoid such transactions, that "duty" would flow only to the IRS rather than to all potential claimants under ERISA § 502.

Third, in light of ERISA's carefully divided enforcement scheme, the inclusion of a tax-based enforcement mechanism in *Title II* of ERISA strongly suggests that a nonfiduciary's participation in Section 406 transactions involving pension plans does not give rise to remedies under *Title I*. *Expressio unius est exclusio alterius* — the expression of one thing is the exclusion of another. *See Leatherman v. Tarrant County Narc. Intell. & Coord. Unit*, 507 U.S. 163, 168 (1993); *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974).

In sum, Congress gave the IRS authority to impose excise taxes on certain nonfiduciary parties in interest with respect to prohibited transactions involving pension plans, and it gave the Secretary and private parties the right to seek certain legal and equitable remedies from fiduciaries who violate Section 406. As this Court observed in *Mertens*, ERISA's "carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254. ERISA is an "enormously complex and detailed statute that resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id.* at 262. By suggesting that nonfiduciary parties in interest who participate in Section 406 transactions should be subject to equitable remedies under Title I of ERISA, petitioners attempt to conflate the separate, and mutually exclusive, enforcement mechanisms that Congress created.[8]

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[8] Petitioners and their *amici* argue at length that a private cause of action against nonfiduciary parties in interest under Section 502(a)(3) is necessary to effectuate ERISA's remedial pur-

[Footnote continued on next page]



2. The legislative history of ERISA confirms what is apparent from the plain language of the statute, namely, that Congress only intended for fiduciary breaches to be subject to equitable remedies under Title I. Congress carefully considered, but ultimately rejected, a statutory provision that would have made parties in interest personally liable for losses to a fund resulting from a prohibited transaction. The Senate version of the bill that became ERISA contained an express provision for party-in-interest liability:

> Any party in interest who participates in a transaction prohibited by this Act knowingly, or with reason to know that the transaction was a transaction to which this Act applies, shall be personally liable to make good to the fund any losses sustained by the fund resulting from such transaction, and to pay to the fund any profits realized by him from such transaction.

S. 4, 93d Cong. § 15(h) (1973); *see also* S. 1179, 93d Cong. § 501(d)(17) (1973). The original House bill did not provide for the imposition of any liability against parties in interest, but provided only for fiduciary liability for participation in prohibited transactions. *See* H.R. Conf. Rep. No. 93-1280 (amendment) (1974) ("Conf. Rep."), *reprinted in* 1974 U.S.C.C.A.N. 5038, 5075.

The conference resolved the difference between the bills by adopting the present system of divided enforcement. Fiduciary responsibility became the province of ERISA Title I,

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pose. Nevertheless, this Court cautioned in *Mertens* that "vague notions of a statute's 'basic purpose' are [] inadequate to overcome the words of its text regarding the *specific* issue under consideration." 508 U.S. at 261 (emphasis in original); *see also Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam) (explaining that no statute pursues a singular purpose at all costs, since legislative compromise means that Congress may seek to further other goals as well).

consistent with the traditional trust law focus on fiduciaries, while parties in interest became the subject of the tax code:

> The conference substitute establishes rules governing the conduct of plan fiduciaries under the labor laws (title I) and also establishes rules governing the conduct of disqualified persons (who are generally the same people as "parties in interest" under the labor law provisions) with respect to the plan under the tax laws (title II). *This division corresponds to the basic difference in focus of the two departments. The labor law provisions apply rules and remedies similar to those under traditional trust law to govern the conduct of fiduciaries. The tax law provisions apply an excise tax on disqualified persons who violate the new prohibited transaction rules* * * *.

Conf. Rep., 1974 U.S.C.C.A.N. at 5076 (emphasis added). Consistent with this division of responsibility, the conference report explains that Title I prohibits only fiduciaries from engaging in certain transactions: "The labor provisions * * * provide general standards of conduct for fiduciaries, and make certain specific transactions 'prohibited transactions' which plan fiduciaries are not to engage in." On the other hand, the report states that "the tax provisions (title II) focus on the disqualified person." *Id. See also id.* at 5100-04.

Upon introducing the Conference Report, Senator Harrison Williams, Chairman of the Senate Committee on Labor and Public Welfare, confirmed that enforcement of fiduciary duties belongs to the Secretary of Labor (and certain private parties) under ERISA Title I, but that parties in interest not subject to the Section 502(i) civil penalty are solely within the domain of the IRS:

> Under the conference substitute, enforcement of fiduciary provisions would primarily lie with the Secretary of Labor who would be empowered to bring civil actions to redress or restrain violations on the part of fiduciaries. He is also authorized to impose civil penalties on parties in interest who participate in prohibited transactions with



> welfare plans which are not subject to the tax qualification provisions of the Internal Revenue Code. However, the Internal Revenue Service would have responsibility for dealing with those who are "disqualified persons"—similar to parties in interest defined in the labor portion of the conference substitute—with authority to impose excise taxes on violators.

1974 U.S.C.C.A.N. at 5188 (statement of Sen. Williams).

In keeping with that divided enforcement scheme, the conference report makes clear that Title I does not authorize suits seeking equitable relief against parties in interest who participate in prohibited transactions. Conspicuously avoiding any reference to suits against parties in interest, the conference report explains that "civil action[s] may be brought by a participant or beneficiary to recover benefits due under the plan, to clarify rights to receive future benefits under the plan, and *for relief from breach of fiduciary responsibility*." Conf. Rep., 1974 U.S.C.C.A.N. at 5106 (emphasis added). Clearly, Congress never intended to subject parties in interest to suit under Section 502(a)(3).

In the face of this legislative record, petitioners are left to argue that Congress made parties in interest liable for equitable relief under ERISA when it inserted the phrase "other appropriate equitable relief" in the final version of Section 502(a)(3). Petitioners cite no legislative history that even hints that Congress intended for this phrase to incorporate the same civil liability provisions that were contained in the Senate version of the bills and which were rejected by the Conference Report. Indeed, it would make little sense for Congress to have eliminated an express provision that made parties in interest liable for the losses sustained by the plan, as well as to pay over any profits realized from the prohibited transaction, in favor of the enacted language of Section 502(a)(3), which makes absolutely no reference to parties in interest.

In sum, ERISA's legislative history makes clear that Congress did not inadvertently omit party in interest liability

from the comprehensive enforcement scheme set out in Title I of the statute. Instead, Congress deliberately declined to authorize the Secretary of Labor and private parties to pursue monetary remedies against nonfiduciary parties in interest under Title I of ERISA.

### C. Petitioners' Textual Arguments Are Meritless, And In Fact Confirm That Nonfiduciary Parties In Interest Are Not Subject To Suit Under Section 502(a)(3).

While ERISA's enforcement scheme, read as a whole, provides compelling support for the proposition that Congress did not intend to make nonfiduciary parties in interest liable under Section 502(a), petitioners and their *amici* draw upon isolated phrases from several ERISA provisions in an effort to bolster their case. There is, however, nothing in the text of ERISA's enforcement provisions that supplies the absent legislative command that nonfiduciary parties in interest are subject to suit under Section 502(a)(3).

**Section 502(a)(3).** Section 502(a)(3) authorizes participants, beneficiaries, and fiduciaries to seek "appropriate equitable relief" for "any act or practice which violates any provision" of ERISA's Title I. 29 U.S.C. § 1132(a)(3); *see also* ERISA § 502(a)(5), 29 U.S.C. § 1132(a)(5) (same for actions by Secretary of Labor). Petitioners and their *amici* contend that, because Section 502(a)(3) does not expressly *limit* the parties who may be sued, it should be read to include parties in interest. That argument, however, misses the point.

This Court has repeatedly emphasized its "unwillingness to infer causes of action in the ERISA context, since that statute's carefully crafted and detailed enforcement scheme provides 'strong evidence that Congress did not intend to authorize other remedies that it simply forgot to incorporate expressly.'" *Mertens*, 508 U.S. at 254, quoting *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146-47 (1985). In this regard, *Mertens* observed that the relevant question in this context is not whether ERISA *precludes* certain types of lawsuits, but whether it "affirmatively *authorizes*" such suits. *Mertens*, 508 U.S at 255 n.5 (emphasis in original). As the Seventh Circuit recognized, *Mertens* determined that Congress did not intend to impose civil liability on nonfiduciaries who participate in a breach of fiduciary duty, because ERISA does not contain an explicit statement of nonfiduciary participation liability. "Similarly, nothing in ERISA makes nonfiduciary parties in interest civilly liable to the plan for participating in a § 1106 transaction." Pet. App. 9a. While petitioners strive to establish inferentially that Congress intended to create a cause of action that ERISA never expressly mentions, their efforts cannot be reconciled with this Court's well settled approach to the interpretation of ERISA.



**Section 502(i).** Section 502(i), 29 U.S.C. § 1132(i), authorizes the Secretary of Labor to assess civil penalties against parties in interest who engage in prohibited transactions with respect to welfare benefit plans.[9] Unlike prohibited transactions involving *pension plans,* which are subject to excise taxes under Section 4975, transactions involving *welfare benefit plans* are generally excluded from regulation by the IRS. *See* 26 U.S.C. § 4975(e)(1). Accordingly, the Secretary of Labor's authority to penalize prohibited transactions involving welfare benefit plans only reinforces the proposition that the IRS has *exclusive* enforcement authority over prohibited transactions involving pension plans. *Botany Worsted Mills v. United States*, 278 U.S. 282, 289 (1929) ("When a statute limits a thing to be done in a particular mode, it precludes the negative of any other mode").

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[9] It is of no consequence that Section 502(i) makes reference to "a transaction prohibited by Section 406 by a party in interest with respect to a plan to which this part applies." 29 U.S.C. § 1132(i). Given its most natural reading, this language merely identifies the transactions for which the Secretary of Labor may impose civil penalties on parties in interest.

Similarly, the existence of a specific mechanism for assessing penalties against parties in interest under Section 502(i) precludes the recovery of equitable remedies under the "catch-all" language in Section 502(a)(3). As the court of appeals correctly noted, the existence of Section 502(i) which provides for the assessment of civil penalties against a party in interest by the Secretary of Labor, along with Section 502(a)(6), which establishes an express cause of action authorizing the Secretary of Labor to sue to collect those penalties, "makes the absence of a specific provision imposing civil remedies on parties in interest all the more striking." J.A. 350. Petitioners contend that "Congress is not required to enact specific provisions for each civil remedy it creates" (Pet. Br. 24), but this argument again ignores this Court's repeated admonitions that it is unwilling "to infer causes of action in the ERISA context." *Mertens*, 508 U.S. at 254, citing *Russell*, 473 U.S. at 146. As this Court said in *Russell*:

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA. * * * "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." * * * "The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement."

473 U.S. at 147 (internal citations omitted). To subject nonfiduciary parties in interest to suits under Section 502(a)(3)—and, by extension, to suits by the Secretary of Labor under Section 502(a)(5)—for restitution would be to upset the carefully divided enforcement scheme that underlies the entire statute.[10]

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[10] There is nothing to the contrary in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), where this Court held that plan-based remedies for fiduciary breaches in Section 502(a)(2) were not intended to foreclose the availability of equitable remedies against fiduciar-

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**Section 502(l).** Section 502(l)(2)(B), 29 U.S.C. § 1132(l)(2)(B), states that "a fiduciary or other person" may be ordered to pay money "to a plan or its participants and beneficiaries in a judicial proceeding instituted by the Secretary under subsection (a)(2) or (a)(5) of [Section 502]." Contrary to petitioners' argument, this language provides no textual support for the proposition that *nonfiduciary* parties in interest are subject to equitable remedies under Section 502(a)(3), because the language and context of this provision indicate that the phrase "other person" refers only to co-fiduciaries. Not only is Section 502(l) among the enforcement provisions of Title I, which deals generally with the obligations of fiduciaries and co-fiduciaries, but it is expressly entitled "Civil penalties on violations by fiduciaries." Moreover, the plain language of Section 502(l) authorizes civil penalties only with respect to breaches of fiduciary responsibility and "knowing participation in such a breach or violation by any other person," Section 502(l)(1), 29 U.S.C. § 1132(l)(1), and this Court has explained that only co-fiduciaries can be liable for knowing participation in a fiduciary breach. *Mertens*, 508 U.S. at 253-54. Indeed, the

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ies under Section 502(a)(3) for the benefit of plan beneficiaries or participants rather than the plan itself. The *Varity* Court noted that the text of Section 502(a)(3), on its face, was "broad enough to cover individual relief for breach of a fiduciary obligation," 516 U.S. at 510, but there can be no similar argument that Section 502(a)(3) plainly extends to nonfiduciaries. Moreover, while section 502(a)(3) acts as a "safety net" and provides "appropriate equitable relief for injuries caused by violations that § 502 does not elsewhere adequately remedy," *Varity*, 516 U.S. at 512, it does not authorize "appropriate equitable relief *at large*, but only appropriate equitable relief for the purpose of redressing any violations or * * * enforcing any provisions of ERISA or an ERISA plan," *Mertens*, 508 U.S. at 253 (internal marks and alterations omitted) (emphasis in original).

*Mertens* Court recognized that the term "other person" in Section 502(l) refers solely to co-fiduciaries. *Id.* at 260-61.

Nor does Section 502(l)(4), 29 U.S.C. § 1132(l)(4), provide any textual evidence that nonfiduciary parties in interest are subject to suit under Section 502(a)(3). Section 502(l)(4) provides that the civil penalties that the Secretary may assess against a fiduciary or other person shall be reduced by the amount of any penalty or tax imposed under ERISA § 502(i), 29 U.S.C. § 1102(i), or Section 4975 of the Internal Revenue Code, 26 U.S.C. § 4975. Inasmuch as *fiduciary* parties in interest (not acting solely in their capacity as fiduciaries) may be subject to penalties or taxes under Sections 502(i) and 4975, there is nothing in Section 502(l)(4) that leads inexorably to the conclusion that *nonfiduciary* parties in interest are subject to equitable remedies under Title I.[11]

**Section 3003(c).** In their attempt to overcome the plain language of Section 406, which expressly imposes obligations on fiduciaries alone, petitioners seize on an isolated phrase in Section 3003(c) of ERISA, which requires the Secretary of Labor to inform the Secretary of the Treasury whenever she "obtains information indicating that a party-in-interest or disqualified person is violating [Section 406]." *See* 29 U.S.C. § 1203(c). Since the statutory terms "party in interest" and "disqualified person" include fiduciaries, *see* 26 U.S.C. § 4975(e)(2)(A), and 29 U.S.C. § 1002(14)(A), nothing in Section 3003(c) compels the conclusion that Section 406 imposes a violable "duty" on *nonfiduciary* parties in interest.

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11 Petitioners erroneously assert that Sections 502(i) and 4975 "explicitly apply to non-fiduciary parties in interest who engage in prohibited transactions." (Pet. Br. 26.) However, the word "non-fiduciary" does not appear in Section 502(i), 29 U.S.C. § 1132(i), and Section 4975 explicitly applies to both fiduciaries and non-fiduciaries, 26 U.S.C. § 4975(e)(2).



Even if that isolated snippet of Section 3003 could overcome the fact that Section 406 by its terms plainly imposes liability only on fiduciaries, plus every structural indication that nonfiduciary parties in interest cannot "violate" Section 406, it would by no means follow that private parties or the Secretary of Labor would have a cause of action against nonfiduciary parties in interest under Section 502(a)(3). As this Court has recognized, the "catch-all" cause of action upon which petitioners rely is not available where the effect would be to circumvent the remedies that Congress expressly provided in ERISA itself. *Varity Corp.*, 516 U.S. at 512. Here, Congress vested the IRS with sole enforcement authority over nonfiduciary parties in interest that participate in prohibited transactions with respect to tax-qualified pension plans, and gave the Department of Labor the authority to assess civil penalties against parties in interest with respect to transactions involving welfare benefit plans.[12] Thus, even if this Court were to find that a nonfiduciary party in interest could somehow "violate" Section 406 by entering into a prohibited transaction with a plan fiduciary, the existence of specific tax penalties under Section 4975, and civil penalties under Section 502(i), would preclude any private cause of action for equitable relief under the "catch-all" provisions of Section 502(a)(3). *See Leatherman*, 507 U.S. at 168.

Indeed, the fact that Section 3003(c) only charges the Secretary of Labor with the obligation to provide notice reinforces the dynamics of ERISA's divided enforcement scheme. If Congress expected the Secretary of Labor to prosecute claims against parties in interest under Section

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12 Petitioners also overlook ERISA § 3003(b), 29 U.S.C. § 1203(b), which expressly recognizes the clear division of enforcement responsibilities between the Secretaries of Labor and the Treasury by requiring them to "consult" and "coordinate" their efforts with respect to enforcement of rules on "prohibited transactions."

502(a)(5) regarding prohibited transactions involving tax qualified pension plans, it undoubtedly would have made the notification duty reciprocal. That it did not indicates that Congress put the authority to pursue parties in interest in those circumstances exclusively in the hands of the Secretary of the Treasury under Title II.

**Section 4975(h).** Under Section 4975(h) of the Internal Revenue Code, 26 U.S.C. § 4975(h), the Secretary of the Treasury may not assess a tax penalty against a disqualified person who participates in a prohibited transaction without first "notify[ing] the Secretary of Labor and provid[ing] him a reasonable opportunity to obtain a correction of the prohibited transaction or to comment on the imposition of such tax." 26 U.S.C. § 4975(h). Petitioners assert that the only way the Secretary of Labor can "obtain a correction" of a prohibited transaction is through a civil action seeking restitution under Section 502(a)(5). However, nothing in the plain language of Section 4975 requires the conclusion that *nonfiduciary* parties in interest are subject to suit under Section 502. The Secretary may seek to "obtain a correction" of a prohibited transaction by filing a claim under Section 502(a)(5) against the *fiduciary* that caused the plan to enter into a prohibited transaction in violation of Section 406. Indeed, under Section 409, a fiduciary is "personally liable to make good any losses the plan" resulting from the breach of any duties "imposed upon fiduciaries by [Title I of ERISA]." 29 U.S.C. § 1109(a). Section 406, which is part of Title I, imposes duties on fiduciaries not to cause prohibited transactions.

In sum, nothing in the ERISA's enforcement provisions support petitioners' argument that parties in interest may be sued under Section 502(a)(3) for equitable relief.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.



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